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Supreme Court, U.S.

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

SAMUEL LORING MORISON,
Petitioner

v.

UNITED STATES OF AMERICA

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTIONS PRESENTED

1. Did Congress intend the espionage statute, 18 U.S.C. § 793(d) and (e), and the theft of government property statute, 18 U.S.C. § 641, to apply to a federal government employee who (a) sent copies of three classified photographs to a news magazine, and (b) in connection with providing additional information to the magazine, retained in his home copies of classified intelligence reports?

2. If Congress did intend these statutes to apply to petitioner's conduct, are they, as construed by the courts below, unconstitutionally vague or overbroad?

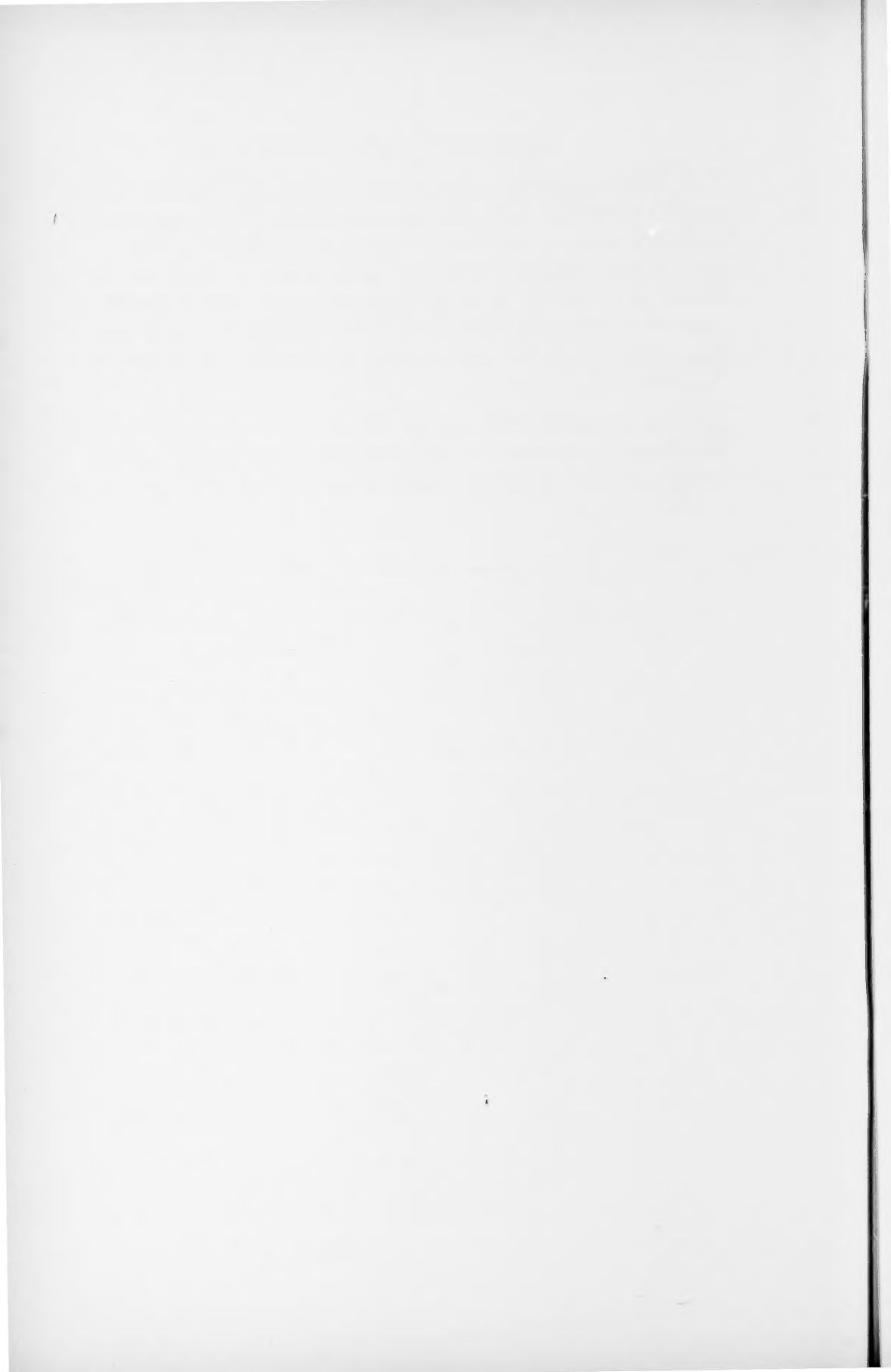


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**PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE FOURTH CIRCUIT**

Samuel Loring Morison petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-60a) is reported at 844 F.2d 1057. The district court's opinion denying petitioner's motion to dismiss the indictment (App. 61a-77a) is reported at 604 F. Supp. 655.

JURISDICTION

The judgment of the court of appeals (App. 78a) was entered on April 1, 1988. A timely petition for rehearing was denied on April 29, 1988 (App. 79a). On June 16,

1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The theft of government property statute, 18 U.S.C. § 641, provides:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

The pertinent subsections of the Espionage Act of 1917, as amended by the Internal Security Act of 1950, 18 U.S.C. § 793(d) and (e), provide:

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to

the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

* * * *

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

STATEMENT

Samuel Loring Morison is the first person to be convicted under the Espionage Act of 1917, 18 U.S.C. § 793 (d) and (e), and the theft of government property statute, 18 U.S.C. § 641, for disclosing classified documents or information to the press. Indeed, this is only the second prosecution under these statutes for disclosures to the press, the first being the ill-fated indictment

of Daniel Ellsberg and Anthony Russo for their roles in disclosing the Pentagon Papers to the *New York Times*.¹ Every other case in which these statutes have been applied to disclosures of classified information has involved classic espionage—the covert transmission of information to foreign agents. This case therefore presents the important question of whether Congress intended these statutes to apply to disclosures to the press and, if so, whether these statutes, as applied to such conduct and as construed by the courts below, are unconstitutionally vague or overbroad.

A. *The Charges*

Until his arrest on October 1, 1984, Morison was employed at the Naval Intelligence Support Center (NISC) in Suitland, Maryland as an analyst of Soviet amphibious ships. For approximately eight years prior to his arrest, Morison had also held, with the Navy's knowledge and consent, a part-time job as the American editor of *Jane's Fighting Ships*, an annual review of the world's navies that is published by a British concern, Jane's Publishing Company.

In mid-1983, Jane's began publishing a magazine entitled *Jane's Defence Weekly*, and Morison began performing various services for the *Weekly* on a voluntary, unpaid basis. During the spring of 1984, he provided an unclassified sketch of a Soviet ship, edited an article written by a member of the magazine's staff, provided corrections on material the magazine had published, wrote a three-page background piece on an explosion that had occurred in the weapons depot of a Soviet naval base at Severomorsk on the North Sea, and subsequently sup-

¹ *United States v. Russo*, No. 9373-(WMB)-CD, *dismissed* (C.D. Cal., May 11, 1973). The case was dismissed when it was revealed that the government failed to disclose that Ellsberg had been overheard on a warrantless wiretap and that government agents had burglarized the office of his psychiatrist.

plemented the information in this piece by telephone. (Court of Appeals Appendix 743-757) (hereafter "C.A. App. —"). The explosion was the subject of much reporting in other media, and *Jane's Defence Weekly* included the material Morison provided along with information obtained from other sources in a published article. In late July 1984, the *Jane's* editors, at their own initiative and without any prompting from Morison, decided to send him a \$300 gratuity for his past contributions to the magazine. (C.A. App. 715-16, 756-59, 782-83, 803.)

Prior to either receiving the \$300 or learning that he would receive it, Morison committed the acts that led to his arrest. At some point during the last week of July 1984, he mailed to *Jane's Defence Weekly* three classified photographs of a Soviet aircraft carrier under construction at the Nikolayev Shipyard on the Black Sea. The pictures had been taken by a KH-11 reconnaissance satellite earlier in the month, and Morison sent to *Jane's* prints that had been made from the original photographs and were available to him at NISC. *Jane's* published the pictures in the August 11, 1984 edition of *Jane's Defence Weekly*, and they were reproduced in print and television media throughout this country and around the world. Morison neither requested nor received any compensation for providing these photographs to *Jane's*. (C.A. App. 822-23.)

The Soviet aircraft carrier was of significant news interest for two reasons. First, it was the Soviet Union's first nuclear powered carrier. Second, it was the first Soviet carrier large enough to accommodate conventional aircraft. All previous Soviet carriers had been limited to vertical take-off and landing aircraft, which are much more limited in their range of operations than conventional aircraft. Consequently, the new nuclear carrier represented a quantum leap in Soviet sea power. (C.A.

App. 810-20, 1044-45, 1069.) When arrested, Morison, after initially denying that he had sent the photos to Jane's, admitted that he had done so in order "to let people know what the other side was doing." (C.A. App. 525-26.)

The government decided to make a test case out of Morison's disclosures. His conduct obviously did not fit the mold of classic espionage: Morison gave the photographs to a magazine for publication, not to a foreign agent, and he neither sought nor received payment for the pictures. At most, the evidence suggested that Morison aspired to permanent employment with *Jane's Defence Weekly*. Nonetheless, the government indicted him under the subsection of the espionage laws that makes it a crime for a person having lawful possession of documents "relating to the national defense" to deliver them to a person not entitled to receive them. 18 U.S.C. § 793(d). This statute carries a penalty of up to ten years imprisonment and a fine not to exceed \$10,000. Not satisfied with charging Morison with espionage for leaking information to the press, the government also charged him under 18 U.S.C. § 641 with stealing the three photographs, which the government alleged had a value in excess of \$100, thereby making the crime a felony and subjecting Morison to ten years in prison and a fine of up to \$10,000.

Following Morison's arrest for disclosure of the photographs, his apartment was searched pursuant to a warrant. During that search, government agents found xerox copies of excerpts of classified intelligence reports concerning the explosion at Severomorsk. The reports, called Weekly Wires, are summaries of intelligence information prepared by NISC and distributed to the United States intelligence community. Although Morison had transmitted some of the information in the Weekly Wire excerpts to *Jane's Defence Weekly*, the government did not charge him with unlawful disclosure of that in-

formation. Instead, he was charged with unlawfully retaining a government document "relating to the national defense" and failing to return it to a proper government official. This charge was brought under a different subsection of the espionage laws, 18 U.S.C. § 793(e), which applies to persons who have unauthorized possession of national defense documents, whereas subsection (d), which formed the basis of the charge on the photographs, applies to those who have lawful possession of such documents. In all other respects, including the applicable penalties, subsections 793(d) and (e) are identical, covering both unlawful transmission and unlawful retention of documents relating to the national defense. The government also indicted Morison, under 18 U.S.C. § 641, for theft of government property having a value over \$100 for making copies of the Weekly Wire excerpts and taking them home.

B. Morison's Contentions

Morison made two principal sets of arguments in the courts below: first, the espionage and theft statutes do not apply to his conduct; and second, if they do, they are unconstitutionally vague and overbroad as applied to that conduct. Both in his motion to dismiss the indictment and on appeal, Morison did not question Congress' constitutional authority to criminalize the disclosure of sensitive defense information to the press. Instead, Morison contended that courts should not apply criminal statutes to conduct that enables the press to inform the public unless it is clear that Congress intended the statutes to have that reach.

Morison maintained that the legislative history of subsections 793(d) and (e) shows that Congress intended these statutes to be limited to acts of espionage, and that there is no evidence that Congress intended section 641 to apply to disclosure of government information in general or classified information in particular. Further-

more, Congress has repeatedly refused to enact a general anti-leak statute, despite repeated requests from the executive branch for such a statute and the widely held view among officials responsible for protecting the national security that current law does not reach disclosures to the press. In light of all these factors, Morison argued that the courts should not usurp Congress' role and "interpret" subsections 793(d) and (e) and section 641 to make such conduct a crime. Morison further argued that since section 641 prohibits the theft of "things," the government cannot properly rely on the value of the intangible information in a document to establish the document's value.

Morison also argued in the courts below that even if subsections 793(d) and (e) and section 641 were intended to apply to disclosures to the press, the statutes are unconstitutionally vague and overbroad as applied to such conduct. On its face, the term "relating to the national defense" in subsections 793(d) and (e) is vague because it is incapable of any precise meaning and therefore fails to give meaningful warning as to what documents fall within its scope. The term is overbroad because it proscribes disclosure of documents relating to the national defense that are harmless and protected by the First Amendment as well as those that might lawfully be regulated because of a compelling interest in secrecy. Section 641, as applied to government documents, contains no limitations at all and therefore makes it a crime for anyone "without authority" to disclose any government document.

C. District Court Proceedings

The district court denied Morison's motion to dismiss the indictment. (App. 61a-77a.) The court agreed that Morison had cited "an impressive wealth of legislative history suggesting that § 793 was only meant to apply in the classic espionage setting." (App. 66a.) However, the

court concluded that it is "impossible to determine exactly what Congress meant when it passed the [espionage] statute, [but] it is more likely that the type of activity that defendant allegedly engaged in was meant to be covered." (*Id.*) The court also ruled that there is no obstacle to applying section 641 to government information. (App. 75a)

In response to Morison's vagueness and overbreadth attacks on the term "relating to the national defense" in subsections 793(d) and (e), the government urged the district court to use a narrowing construction that had been approved by the Fourth Circuit in a prior case involving genuine espionage. *United States v. Dedeyan*, 584 F.2d 36 (4th Cir. 1978). Under this construction, in order to prove that a document relates to the national defense, the government must establish that (1) the information is closely held by the government, and (2) unauthorized disclosure would be potentially damaging to the United States or useful to an enemy of the United States. Over Morison's objection that "potential damage" was also vague and overbroad, the judge used this construction of "relating to the national defense" in instructing the jury.

There was no dispute at trial that Morison disclosed the photographs to Jane's or that he had retained copies of the Weekly Wires excerpts at his home. The principal issues for the jury were whether disclosure was potentially damaging to the United States or useful to an enemy and whether the information in the photographs and Weekly Wires was worth more than \$100. The government contended that the photographs met these criteria because they reveal the capabilities of the KH-11 satellite as of July 1984, and that the Weekly Wires met the criteria because, if they were disclosed, they would reveal the capabilities of United States intelligence agencies to assess the extent of the damage from the explosion at Severomorsk. There was no testimony that the

photographs and Weekly Wires had any value apart from the information they revealed.

The defense contested these assertions with respect to the photographs by eliciting admissions from the government that (1) in 1978 a CIA employee had sold to the Russians a copy of the manual for the KH-11 satellite that fully described its capabilities, and (2) prior unauthorized publications of KH-11 photographs revealed as much about the capabilities of the satellite as the Jane's photographs.² In light of these prior disclosures, a retired CIA official, who had been the senior United States government official responsible for coordinating the KH-11 program, testified in Morison's behalf that the potential damage from disclosure of the Jane's photographs was "zero." (C.A. App. 922-28, 951-52.) However, the government insisted that disclosure of the photographs met the minimal test of being "potentially" useful to our enemies because they confirmed that in July 1984 the KH-11 was still operating in the same manner as described by the manual and disclosed in the previously compromised photographs.

The defense attempted to demonstrate that the information in the Weekly Wires concerning the Severomorsk explosion was not closely held by introducing a large collection of news reports on the explosion that were attributed to government sources. A British journalist also testified that he had been told of details of the Severomorsk explosion by a European NATO official stationed in Washington. In addition, a former CIA Soviet analyst

² In December 1981 a magazine entitled *Aviation Week and Space Technology* published a picture of a Soviet airfield and bomber that had been produced by a KH-11 satellite. (C.A. App. 449.) Furthermore, a number of KH-11 pictures had been lost in the Iranian desert in April 1980 when the attempt to rescue the hostages at the United States Embassy in Teheran was aborted. The Iranians recovered the abandoned pictures and published them in a book that they distributed around the world. (C.A. App. 450.)

testified that the *Weekly Wires* would not be useful to the Russians.

The jury found Morison guilty on all four counts, and the district judge sentenced him to two years imprisonment on each count, each sentence to run concurrently.³

D. The Court of Appeals Opinion

Although the court of appeals unanimously affirmed Morison's conviction, each member of the panel wrote a separate opinion. Writing for the majority, Judge Russell found that the language of subsections 793(d) and (e) applies to anyone who discloses a document relating to the national defense to one not entitled to receive it and to anyone who retains a document relating to the national defense if he is not authorized to have it. The court further noted that another section of the Espionage Act prohibits disclosure of documents relating to the national defense to agents of foreign governments. 18 U.S.C. § 794(a). From this observation, the court concluded that Congress must have intended subsection 794(a) to cover disclosures to spies and subsection 793(d) to cover disclosures to other individuals.⁴

³ Shortly after Morison's arrest, the district court freed him on bond, and the court continued this condition of release pending appeal. After the court of appeals issued its decision, the district judge indicated that he would require Morison to report to prison. Following unsuccessful applications to the court of appeals and this Court for release pending disposition of this petition, Morison entered the federal prison in Danbury, Connecticut on June 15, 1988.

⁴ Subsection 794(a) carries a punishment of death or life imprisonment and requires the government to prove that the defendant acted "with intent or reason to believe that [the document] is to be used to the injury of the United States or to the advantage of a foreign power." Subsection 793(d) does not contain this culpability requirement and carries a maximum sentence of ten years imprisonment. Accordingly, the distinction between the two statutes is not that 794(a) applies to disclosures to foreign agents while 793(d) applies to disclosures to the press, but rather is in the degree of culpability of one who discloses national defense documents to foreign agents.

Although the majority found it unnecessary and inappropriate to resort to the legislative history because of the supposed clarity of the statutory language, it nonetheless purported to review the history. On the basis of a cursory examination that overlooked virtually all of the relevant material, the court concluded that subsections 793(d) and (e) were not limited to espionage. It also rationalized the fact that this is only the second prosecution for disclosures to the press by noting that "[v]iolations under the Act are not easily established" and that "any prosecution under the Act will in every case pose difficult problems of balancing the need for prosecution and the possible damage that a public trial will require by way of disclosure of vital national interest secrets in a public trial." (App. 18a.)⁵ Like the district court, the majority opinion rejected Morison's vagueness and overbreadth arguments on the basis of its *Dedeyan* decision. (App. 25a-30a.)

In sustaining the theft convictions, the court stated that Morison's conduct "would seem to represent a textbook application of the crime set forth in section 641." (App. 39a.) The court further observed that "[t]his case does not involve copying; this case involves the actual theft and deprivation of the government of its own tangible property." While literally true, this statement seriously mischaracterizes the facts. The portions of the *Weekly Wires* found in Morison's apartment were xeroxed excerpts of office copies, and the photographs he sent to Jane's were prints made from the originals. But even more significantly, the court failed to appreciate that the government had established that the photographs and *Weekly Wires* were worth more than \$100 only by ref-

⁵ The court did not address the fact that, although these observations apply with at least equal, if not greater, force to cases of espionage, the government regularly brings such prosecutions, even though leaks appear to occur with greater frequency than acts of espionage.

erence to the value of the information they contained rather than their value as tangible things. Accordingly, the court did not respond to Morison's contention that, because section 641 applies only to "things," the value of the photographs and Weekly Wire excerpts should be measured by their worth as tangible property and not by the value of any information they may contain.

Although Judge Russell had written that "we do not perceive any First Amendment rights to be implicated here" (App. 20a), Judge Wilkinson recognized in his concurring opinion that this case involves significant First Amendment interests because "[c]riminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity." (App. 47a.) He also agreed that whatever Morison's motives may have been for sending the photographs to *Jane's Defence Weekly*, "the undeniable effect of the disclosure was to enhance public knowledge and interest in the projection of Soviet sea power such as that revealed in the satellite photos." (App. 48a.) Judge Wilkinson also noted that this case involves significant interests in protecting the government's intelligence gathering sources. Thus, in his view, the case requires a balancing of the competing interests in secrecy and disclosure.

Since these issues involve the national security, Judge Wilkinson wrote, courts should be deferential to the judgments of the Congress and the executive branch. Applying this deferential balancing, he concluded that criminalization of disclosures of classified information to the press by a government employee is not an unreasonable intrusion on First Amendment interests. However, like Judge Russell, Judge Wilkinson did not address Morison's contention that Congress did not intend subsections 793(d) and (e) and section 641 to apply to leaks, but instead assumed that Congress had intended the statutes to reach Morison's conduct.

Judge Phillips concurred in Judge Russell's opinion with a reservation over "suggestions that as applied to conduct of the type charged to Morison, the Espionage statutes simply do not implicate any first amendment right." (App. 58a.) On that score, Judge Phillips agreed with "Judge Wilkinson's differing view that the First Amendment issues raised by Morison are real and substantial," and concurred in Judge Wilkinson's opinion dealing with these issues. (*Id.*) Judge Phillips further wrote that "[i]f one thing is clear, it is that the Espionage Act statutes as now broadly drawn are unwieldy and imprecise instruments for prosecuting government 'leakers' to the press as opposed to government 'moles' in the service of other countries." (*Id.*)

Judge Phillips agreed with Morison that the key term "relating to the national defense," was, on its face, both vague and overbroad. Consequently, he wrote, subsections 793(d) and (e) "can only be constitutionally applied to convict press leakers (acting for whatever purposes) by limiting jury instructions which sufficiently flesh out" that term. (*Id.*) The question of whether the limiting construction used at Morison's trial adequately remedied the statute's "facial vice" was "a close one" for Judge Phillips. (*Id.*) Indeed, he stated that "were we writing on a clean slate, I might have grave doubts about the sufficiency of the limiting instruction used in Morison's trial." (App. 59a.) In his view, "[t]he requirement that information relating to the national defense merely have some 'potential' for damage or usefulness still sweeps extremely broadly[,] [and] [o]ne may wonder whether any information shown to be related somehow to national defense could fail to have at least some such 'potential.'" (*Id.*) However, since this instruction had been approved in prior Fourth Circuit decisions dealing with classic espionage, Judge Phillips was constrained to concur in the use of the instruction in this case. (*Id.*)

REASONS FOR GRANTING THE WRIT

A. Introduction and Summary

This case presents the question of whether Congress intended the general espionage laws and the theft of government property statute to apply to leaks of government documents relating to the national defense and to the retention of such documents in connection with providing information to the press. Beyond its importance to federal employees, the question is of vital concern to the public because, as Judges Wilkinson and Phillips recognized, application of the espionage and theft statutes to disclosures to the press will diminish the amount of information that the press can report to the public about important national security matters. If these statutes are applied to leaks, they will not only deter government employees from disclosing information to the press but also deter the press from receiving and publishing such information because the statutes under which Morison was convicted can be applied to the recipient as well as the provider of government documents.⁶ The importance of the case is underlined by the fact that virtually all of the nation's major news organizations appeared in the court of appeals as *amici curiae* (App. 1a) to express their dismay over the application of these statutes to Morison's conduct. Reasonable people can and do differ over whether an anti-leak statute is good or bad policy, but no one can seriously dispute that the heretofore unresolved question of whether current law supplies such a statute is an important one.

In addition to the impact that the decision below will have on the availability of information to the press and public, this case also presents an even deeper question

⁶ Subsection 793(e), which was the basis of the conviction for retaining copies of the Weekly Wire excerpts, specifically applies to a person who is in unauthorized possession of documents relating to the national defense, and section 641 specifically applies to one who receives government property.

concerning the proper role of the courts in interpreting criminal statutes, especially where the interpretation has serious consequences for public knowledge and debate on important issues. Morison does not contend that the First Amendment disables Congress from enacting an appropriately drafted statute making it a crime for government officials to disclose sensitive information. However, given the First Amendment values at stake, he contends that unless it is clear that Congress intended subsections 793(d) and (e) and section 641 to apply to the conduct in which he engaged, it is improper for courts to expand these statutes to accomplish a result that Congress did not clearly legislate.

It is a fundamental principle of due process, separation of powers, and the canons of statutory construction that courts will not extend any criminal statute to conduct when it is uncertain whether the legislature intended to reach that conduct. *McNally v. United States*, 107 S.Ct. 2875, 2881 (1987); *Dowling v. United States*, 473 U.S. 207, 213-14 (1985). When, as here, the statute affects interests protected by the First Amendment, this rule has special force and the legislative intent must be especially clear. *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966). See *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958). Judge Harlan explained this point well when he wrote that government cannot criminalize conduct that is within the range of First Amendment protection by means of a "general and all-inclusive . . . prohibition." *Garner v. Louisiana*, 368 U.S. 157, 202 (1961) (concurring opinion). Instead, the legislature must enact a statute that is "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)). This limitation is not "because control of such activity is beyond the power of the State, but because sound constitutional principles demand of the state legislature that it

focus on the nature of the otherwise 'protected' conduct it is prohibiting, and that it then make a legislative judgment as to whether that conduct presents so clear and present a danger to the welfare of the community that it may legitimately be criminally proscribed." *Id.* at 203.

As we demonstrate below, Congress has not made that judgment with respect to leaks to the press. Whether this nation should have a general anti-leak statute is a difficult policy question, but there is no question that the decision is for Congress to make rather than for the courts through expansion of existing statutes that were intended for other purposes. "If there is a gap in the law, the right and the duty, if any, to fill it do not devolve upon the courts." *United States v. Laub*, 385 U.S. 475, 486 (1967).

B. Subsections 793(d) and (e)

1. In the leading study of the espionage statutes, two prominent scholars concluded on the basis of an exhaustive review of the legislative history that "Congress undoubtedly did not understand 793(d) and (e)" to reach "[t]he source who leaks defense information to the press." Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 1000 (1973).⁷ Throughout the debates that preceded en-

⁷ Contrary to the opinion of the court of appeals (App. 11a-12a), it is appropriate to examine the legislative history of subsections 793(d) and (e) for several reasons. Most importantly, the First Amendment implications of applying these statutes to disclosures to the press require the Court to examine carefully whether Congress actually intended such a result. In addition, whenever a statute is unclear, resort to the legislative history is proper, *Allen v. State Board of Elections*, 393 U.S. 544, 570 (1969), and, as Justice Harlan recognized, the Espionage Act of 1917 is "a singularly opaque statute." *New York Times Co. v. United States*, 403 U.S. 713, 754 (1971) (dissenting opinion). Indeed, even when the language of a statute is clear, the legislative history may appropriately be con-

actment of the statute in 1917, the bill's supporters repeatedly stated that it was designed to stop spies and that other Americans had nothing to fear. Senator Pittman, for example, stated:

The object of this act is to punish spies. That is the object of the act. The object of the act is to punish a man guilty of a crime, and that crime consists in spying on his government.

54 Cong. Rec. 3599 (1917).⁸

In addition, Congress rejected various versions of a provision that would have specifically authorized prosecution of the press and its sources for publication of information designated by Presidential regulation as relating to the national defense. See Edgar & Schmidt, *supra*, 73 Colum. L. Rev. at 946-65, 1013-14. Although proponents of this restriction on publication argued that criticism of government policy would be protected, the successful opponents argued that criticism was impossible without disclosures of facts, which in many cases could come only from government officials. The debate focused on two examples of actual press stories that had been based on disclosures by government officials, and Congress refused to criminalize the publication of such stories.⁹ Since the

sulted to determine whether there is a clearly expressed legislative intention contrary to that language. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1213 n.12 (1987); *United States v. James*, 106 S.Ct. 3116, 3122 (1986). Moreover, the government's proposal that the district court employ a limiting instruction in defining for the jury the term "relating to the national defense" was a candid admission that the statute cannot be read literally.

⁸ Similar statements are found at 54 Cong. Rec. 3592-93 (Sen. Lee); 3600 (Sen. Overman) (1917); 55 Cong. Rec. 1590 (Rep. Webb); 1695 (Rep. Morgan); 1700 (Rep. LaGuardia); 1752 (Rep. Osborne); 1768-69 (Rep. Kelly); 2095 (Sen. Husting) (1917).

⁹ One was a story in the *London Times* that British troops were being killed because their own ammunition was defective. 54 Cong. Rec. 3607 (1917); 55 Cong. Rec. 780-81, 2121 (1917). The other was

legislators realized that these stories were based on information from government officials, 55 Cong. Rec. 2115, 2122 (1917), it is apparent that Congress also refused to criminalize disclosures by officials who leak to the press.

When Congress amended the 1917 espionage statute in 1950, it again demonstrated that it intended criminal penalties to reach only those engaged in espionage. As in 1917, some Members questioned whether the statute would stifle press reporting of defense matters. *See, e.g.*, 95 Cong. Rec. 9747 (1949). In order to allay these concerns, Senator McCarran, the chief sponsor of the amendment, asked Attorney General Tom Clark for his opinion. *Id.* Clark replied that "nobody other than a spy, saboteur, or other person who would weaken the internal security of the Nation need have any fear of prosecution under either existing law or the provisions of this bill." *Id.* at 9749.

2. In addition to the specific legislative history of subsections 793(d) and (e), there are other factors that should cause courts to refrain from expanding these statutes to reach disclosures to the press. Despite periodic requests from the executive branch over the past four decades for a broad anti-leak statute, "Congress has repeatedly refused to enact a statute which would make criminal the mere unauthorized disclosure of classified information." *United States v. Truong Dinh Hung*, 629 F.2d 908, 927 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982) (separate opinion of Winter, J.).¹⁰ Instead, Congress has enacted several statutes aimed at disclosure of specific types of particularly sensitive information—classi-

a story revealing the Navy's plan to spread a net across New York harbor to catch submarines. 55 Cong. Rec. 2073, 2111-12 (1917).

¹⁰ *See National Security Secrets and the Administration of Justice: Report of the Senate Select Comm. on Intelligence*, 95th Cong., 2d Sess. 17-19 (1978) (summarizing past legislative initiatives).

fied communications intelligence, 18 U.S.C. § 798; atomic energy information, 42 U.S.C. §§ 2274, 2277; and the identities of covert intelligence agents, 50 U.S.C. § 601—and one statute that makes it a crime for a government employee to disclose classified information to a foreign agent or a member of a communist organization. 50 U.S.C. § 783(b). If subsections 793(d) and (e) reached the general practice of leaking, none of these additional statutes would have been necessary, nor would the executive branch have repeatedly sought an anti-leak statute.

Furthermore, government officials charged with protecting the national security have frequently stated that existing statutes do not reach press leaks. For example, William Colby, the former Director of Central Intelligence, has testified that Congress “has drawn a line between espionage for a foreign power and simple disclosure of our foreign policy and defense secrets, and decided that the latter problems are an acceptable cost of the kind of society we prefer.” *Espionage Laws and Leaks: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 146 (1979). See *id.* at 22 (statement of CIA’s General Counsel).

Several executive branch studies have concluded that existing criminal statutes do not clearly apply to disclosures to the press. For example, in 1982, an interdepartmental task force found that there is a generally accepted understanding that the espionage and theft statutes do not apply to press leaks.¹¹ In analyzing the legal framework relevant to leaks, this report stated that “there is no single statute that makes it a crime as such for a

¹¹ *Report of the Interdepartmental Group on Unauthorized Disclosure of Classified Information* (March 31, 1982), reprinted in *Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st and 2d Sess. 166-180 (1984).

government employee to disclose classified information without authorization." *Id.* at 167. The report asserted that subsections 793(d) and (e) might be used in leak cases, but acknowledged that "[t]hese provisions have not been used in the past to prosecute unauthorized disclosures of classified information, and their application to such cases is not entirely clear." *Id.* at 172.

In 1985, while this prosecution was underway, the CIA informed the Office of Management and Budget that "[w]ith the narrow exceptions of unauthorized disclosures of atomic energy Restricted Data, communications intelligence and cryptography information, and the identities of covert agents, willful unauthorized disclosures of classified information by those entrusted with it by the government are not *per se* offenses under federal criminal statutes." (Brief of Appellant, Addendum at 7.) See Edgar & Schmidt, *supra*, 73 Colum. L. Rev. at 1055 (citing earlier government studies reaching the same conclusion).

In light of the extensive evidence that Congress did not intend subsections 793(d) and (e) to apply to leaks and the important consequences for the public of the court of appeals' contrary holding, this Court should grant review.

C. Section 641

Morison's conviction presents two important questions concerning the reach of the section 641: first, is it proper to apply this general theft statute to classified documents in view of the fact that Congress has specifically criminalized the disclosure of only certain categories of such documents and has declined to enact a general anti-leak statute; and second—a question that divides the circuits—does section 641, which proscribes the taking of "things," apply to the taking of intangible information. Since the consequences of applying section 641 to leaks are the same as applying subsections 793(d) and (e) to such conduct, Morison's conviction under the theft statute presents

questions just as important as those presented by his conviction under the espionage statutes. Moreover, the grounds for doubting that Congress intended section 641 to proscribe press leaks are even greater than the grounds for doubting that Congress intended the espionage statutes to reach that conduct.

1. While the use of subsections 793(d) and (e) to prosecute leaks is dubious at best, those statutes at least deal with the general subject of the protection of national defense information. But felony convictions for disclosing government information are wholly outside the intended reach of section 641. The legislative history of subsections 793(d) and (e) demonstrates not only that Congress did not intend the espionage statutes to apply to disclosures to the press, but also that Congress did not believe that the theft statute, which in various forms had been on the books since 1875, applies to such disclosures. Professors Edgar and Schmidt, in commenting on the district court decision in this case, concluded in light of their earlier research on the espionage statutes that extension of section 641 to disclosures to the press of classified information "flatly contravenes congressional intent." Edgar & Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. C.R.-C.L. L. Rev. 349, 402 (1986). If in fact section 641 had all the while been an anti-leak statute, Congress' concern, both in 1917 and 1950, not to criminalize disclosures to the press was a misplaced waste of time. Indeed, if Congress intended section 641 to have the sweep ascribed to it by the courts below, there would be no need for the statutes making it a crime to disclose crop reports, 18 U.S.C. § 1902, trade secrets, 18 U.S.C. § 1905, information obtained through electronic surveillance, 18 U.S.C. § 2511(c), or tax returns, 26 U.S.C. § 7213.

In his separate opinion in *Truong*, Judge Winter concluded that it is "apparent that § 641 cannot, consistent

with the congressional framework of criminal statutes explicitly directed at classified information, be applied to punish . . . the unauthorized disclosure of classified information." 629 F.2d at 926.¹² He noted that "Congress has legislated frequently and with precision with regard to the unauthorized disclosure of classified information, and it has chosen to punish only certain categories of disclosures and defendants." *Id.* Thus, "[i]f § 641 were extended to penalize the unauthorized disclosure of classified information, it would greatly alter this meticulously woven fabric of criminal sanctions . . . [and] sweep aside many of the limitations Congress has placed upon the imposition of criminal sanctions for the disclosure of classified information." *Id.* at 926-27. Judge Winter therefore concluded that "[b]ecause § 641 would disturb the structure of criminal prohibitions Congress has erected to prevent some, and only some, disclosures of classified information, the general anti-theft statute should not be stretched to penalize the unauthorized disclosure of classified information." *Id.* at 927 (footnote omitted).

Stated another way, there is even less basis for believing that Congress intended that the general federal statute prohibiting the theft of government property was ever intended to be used to punish those who leak government documents than there is for believing that the espionage laws apply to such conduct. Because of the potential that such a sweeping interpretation has for chilling dissent, dampening a free press, and limiting the amount of information available to the public, the Court should grant review.

¹² Truong and a co-defendant were convicted under espionage counts as well as section 641. Concluding that the concurrent sentence rule made consideration of the section 641 conviction unnecessary, the two other panel members did not join Judge Winter's discussion of section 641. *Id.* at 922. Judge Winter did not consider Morison's suggestion for rehearing *en banc* because he had earlier recused himself from this case.

2. In addition to the question whether section 641 applies to classified information, there is another question, over which the circuits are divided, whether the statute applies to intangible property of any sort. This issue is clearly presented in this case because the government's proof that the photographs Morison sent to Jane's and the xerox copies of the Weekly Wires he kept at his apartment were worth more than \$100—the statute's dividing line between a misdemeanor and a felony—rested on the value of the information contained in the photographs and Weekly Wires rather than on their value as tangible property. To the extent Morison was convicted of a felony under section 641, it was because he converted intangible information rather than tangible property. However, under a correct reading of the statute, the government should have been required to prove that the tangible constituents of the photographs and Weekly Wires—the paper and the printing processes that produced them—were worth more than \$100 in order to convict Morison of a felony. The government, however, made no such showing. If indeed section 641 applies to classified documents, Morison's taking of the prints of the photographs and the xeroxed excerpts of the Weekly Wires may have been a misdemeanor, but it was not a felony.

In *Chappell v. United States*, 270 F.2d 274, 276-78 (9th Cir. 1959), the court held that section 641 applies only to the theft or conversion of tangible property and not to intangibles. In that case an Air Force sergeant directed one of his subordinates to paint private apartments owned by the sergeant on the Air Force's time. On the basis of a thorough examination of the common law history of the crimes incorporated in section 641, the court concluded that none of them apply to the appropriation of intangible property.

The Ninth Circuit has recently reaffirmed *Chappell* in *United States v. Tobias*, 836 F.2d 449 (9th Cir.), cert.

denied, 108 S.Ct. 1299 (1988). In that case, a Navy radioman was charged with selling cryptographic cards that are used in the operation of shipboard coding machines. In adhering to the holding in *Chappell* that section 641 applies only to tangible goods, the *Tobias* court noted that "[t]his interpretation has the advantage of avoiding the first amendment problems which might be caused by applying the terms of section 641 to intangible goods—like classified information." 836 F.2d at 451. Nonetheless, the court affirmed *Tobias*' conviction because the cryptographic cards were a device for encoding and decoding classified messages and did not contain the messages themselves. *Id.* at 452.

Other courts have differed with the Ninth Circuit and held that section 641 does apply to intangible matters, including government information divorced from the documents in which they appear. *United States v. Jeter*, 775 F.2d 670, 679-82 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986); *United States v. Girard*, 601 F.2d 69, 70-72 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979). This conflict between the circuits merits this Court's attention, particularly in view of the important First Amendment implications of any holding that conversion of government information, whether classified or not, falls within the ambit of section 641.

D. Vagueness and Overbreadth

If the Court concludes that subsections 793(d) and (e) and section 641 apply to petitioner's conduct, then it must face the question of whether, as construed by the courts below, they are unconstitutionally vague or overbroad. As leading scholars have noted, statutes that make it a felony to disclose government documents in any way "relating to the national defense" raise significant constitutional issues. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 Stan. L. Rev. 311, 324-27 (1974); Edgar & Schmidt, *The Espionage Statutes and Publication of De-*

fense Information, supra, 73 Colum. L. Rev. at 1000. Similarly, if section 641 applies to the unauthorized disclosure of any government document, it too is substantially overbroad. Nimmer, *supra*, 26 Stan. L. Rev. at 322. And, if commission of a felony under section 641 depends on the valuation of intangible information, the statute is vague as well.

The courts below answered Morison's vagueness arguments, in part, by observing that since the photographs and Weekly Wires were classified, Morison was on notice that he should not have taken them. But as we have seen, Congress has, with limited exceptions not applicable here, refused to enforce the classification system with criminal penalties. Accordingly, classification is not a legitimate means to cure the vagueness of either subsections 793(d) and (e) or section 641. Edgar & Schmidt, *supra*, 73 Colum. L. Rev. at 1057.

The courts below also responded to Morison's constitutional challenge to subsections 793(d) and (e) by relying on the *Dedeyan* construction of the term "relating to the national defense." In urging the courts to use this limiting construction, the government conceded that this term must be narrowed from its facial reach. However, the concept of "potential" damage or usefulness merely substitutes one vague and overbroad term for another. As Judge Phillips recognized in voicing "grave doubts about the sufficiency" of this instruction, it "still sweeps extremely broadly," and under this standard the government will always be able to demonstrate "at least some such 'potential'" with respect to any document that relates to the national defense. (App. 59a.) Indeed, in view of the extensive prior compromises of the capabilities of the KH-11 satellite and the fact that the Weekly Wires never left Morison's apartment, the question of whether his conduct caused any realistically foreseeable or probable damage was not free of reasonable doubt. However, as instructed under the undefined and open-ended concept

of "potential" damage, the jury was virtually required to convict. These interpretive problems presented by subsections 793(d) and (e) and section 641 are important issues that merit this Court's attention.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 28, 1988

88-169

No. _____

Supreme Court, U.S.

FILED

JUL 28 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL LORING MORISON,
Petitioner

v.

UNITED STATES OF AMERICA

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5008

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

SAMUEL LORING MORISON,
Defendant-Appellant.

THE WASHINGTON POST; CBS, INC.; NATIONAL BROADCASTING COMPANY, INC.; CAPITAL CITIES/ABC, INC.; TIME, INC.; NEWSWEEK; U.S. NEWS & WORLD REPORT; THE WALL STREET JOURNAL; THE NEW YORK TIMES; THE NEW YORK DAILY NEWS; THE LOS ANGELES TIMES; THE CHICAGO TRIBUNE; THE BOSTON GLOBE; THE ATLANTA JOURNAL AND CONSTITUTION; THE MIAMI HERALD; THE DALLAS MORNING NEWS; THE MINNEAPOLIS STAR AND TRIBUNE; OTTAWAY NEWSPAPERS, INC.; THE ASSOCIATED PRESS; NATIONAL PUBLIC RADIO; PULITZER BROADCASTING COMPANY; THE AMERICAN SOCIETY OF NEWSPAPER EDITORS; THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATIONS; THE AMERICAN BOOKSELLERS ASSOCIATION, INC.; ASSOCIATED PRESS MANAGING EDITORS; THE MAGAZINE PUBLISHERS ASSOCIATION; THE NATIONAL ASSOCIATION OF BROADCASTERS; THE NEWSPAPER GUILD; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; THE SOCIETY OF PROFESSIONAL JOURNALISTS AND PUBLIC CITIZEN; WASHINGTON LEGAL FOUNDATION; THE ALLIED EDUCATION FOUNDATION,

Amici Curiae

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Joseph H. Young, District Judge— (CR-84-455-Y)

Argued: October 8, 1987

Decided: April 1, 1988

Before RUSSELL, PHILLIPS, and WILKINSON, Circuit judges.

Mark H. Lynch (Charles F. C. Ruff, Neil K. Roman, Steven F. Reich, Covington & Burling, Jacob A. Stein, Robert F. Muse, Stein, Mitchell & Mezines, Washington, D.C., on brief), for defendant-appellant. Breckinridge Long Willcox, U.S. Atty., Baltimore, Md., for plaintiff-appellee. (Daniel J. Popeo, Utica, N.Y., Paul D. Kamenar, Washington, D.C., Michael P. McDonald, Marianne M. Hall on brief), for amici curiae Washington Legal Foundation. (Patti A. Goldman, Alan B. Morrison on brief), for amicus curiae Public Citizen. (Kevin T. Baine, David E. Kendall, Victoria L. Radd, Williams & Connolly, Washington, D.C., on brief), for amici curiae The Washington Post, et al.

DONALD RUSSELL, Circuit Judge:

The defendant is appealing his conviction under four counts of an indictment for violation of 18 U.S.C. § 641, and of two provisions of the Espionage Act, 18 U.S.C. § 793(d) and (e). The violations of the Espionage Act involved the unauthorized transmittal of certain satellite secured photographs of Soviet naval preparations to "one not entitled to receive them" (count 1) and the obtaining of unauthorized possession of secret intelligence reports and the retaining of them without delivering them to "one entitled to receive" them (count 3). Counts 2 and 4 of the indictment charged violation of the theft provisions of 18 U.S.C. § 641. His defense was essentially that

the statutes did not encompass the conduct charged against him and, if they did, the statutes were unconstitutional. At trial, he also found error in certain evidentiary rulings by the district judge. We find the claims of error unfounded and affirm the conviction.

I.

Summary of the Facts

The defendant was employed at the Naval Intelligence Support Center (NISC) at Suitland, Maryland from 1974 until October, 1984. At the time of the incidents involved in this prosecution, he was assigned as an amphibious and hospital ship and mine warfare analyst in the NISC and as such had been given a security clearance of "Top Secret-Sensitive Compartmented Information." His work place was in what was described as a "vaulted area," closed to all persons without a Top Secret Clearance.¹ In connection with his security clearance, he had signed a Non-Disclosure Agreement. In his Non-Disclosure Agreement, the defendant acknowledged that he had received "a security indoctrination concerning the nature and protection of Sensitive Compartmented Information, including the procedure to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it and I understand these procedures. . . . [that he had been] advised that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of Sensitive Compartmented Information by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. . . . [that he understood he was] obligated by law and regulation not to disclose any classified information in an unauthorized fashion. . . . [that he had been] advised that any un-

¹ Because of the secrecy imposed in such an area, "Secret" material could be left on the desk of the employees while they were away.

authorized disclosure of Sensitive Compartmented Information by me may constitute violations of United States criminal laws, including the provisions of Section 793, 794, 798 and 952, Title 18, United States Code. . . ."

For some time prior to the incidents with which this prosecution is concerned, the defendant had been doing certain off-duty work for *Jane's Fighting Ships*, an annual English publication which provided current information on naval operations internationally. Sometime before July, 1984, *Jane's*, which for many years had been publishing *Jane's*, had begun the publication of another periodical on a weekly basis. This new publication was called *Jane's Defence Weekly* and its editor-in-chief was Derek Wood, with an office in London. The defendant had been paid varying amounts for such services as rendered *Jane's* dependent on the value of the information he furnished. This arrangement with *Jane's* had been submitted to and approved by the Navy but subject to the defendant's agreement that he would not obtain and supply any classified information on the U.S. Navy or extract unclassified data on any subject and forward it to *Jane's*. The defendant's off-duty services with *Jane's* had become a subject of some controversy between him and the Navy. As a result, the defendant had become dissatisfied with his employment by the Navy and wished to secure full-time employment with *Jane's*. The defendant began a correspondence with Wood on the prospects for full-time employment with the periodical. He requested an opportunity to interview Wood when the latter was in Washington next.

Wood visited Washington in June, 1984, and, by arrangement, saw the defendant in connection with the latter's request for employment. At that time, Wood discussed with the defendant a report which had appeared in the American press with regard to an explosion that had recently occurred at the Severomorsk Soviet Naval base. Wood expressed the interest of his publication in

securing additional details since such an explosion was "a very serious matter." The defendant told Wood that the explosion "was a much larger subject than even they had thought and there was a lot more behind it." The defendant also said he could "provide more material on it" if *Jane's* were interested. Wood responded that he was interested in receiving additional material on the explosion and, if the defendant were able to provide such, he could use for transmission of such material to *Jane's* "the facsimile machine for direct transmission in our [*Jane's*] Washington editorial office." The defendant told Wood also that he could provide Wood with other material. While there was no direct statement about what compensation the defendant would receive if he sent material to Wood that was used the practice had been that when the defendant had in the past furnished material of interest *Jane's* had paid the defendant. When Wood returned to London a few days later, he received from the defendant "about three typed pages of material background on Severomorsk." A few days later, the defendant transmitted to Wood "two other items on further explosions that had occurred at the site on different dates and also a mention of one particular explosion in East Germany."

The activity of the defendant which led to this prosecution began on July 24, 1984, a few days after the interview of the defendant by Wood and after the defendant had sent Wood the material described in the preceding paragraph. At that time the defendant saw, on the desk of another employee in the vaulted area where he worked, certain glossy photographs depicting a Soviet aircraft carrier under construction in a Black Sea naval shipyard. The photographs, produced by a KH-11 reconnaissance satellite photographing machine, had been given this analyst so that he could analyze and determine the capabilities and capacities of the carrier under construction. The photographs were stamped "Secret" and also

had a "Warning Notice: Intelligence Sources or Methods Involved" imprinted on the borders of the photographs. The defendant later in his confession said he had earlier sent an artist's sketch of a Soviet carrier under construction to *Jane's* and had been paid \$200 for his services. When he saw the photographs, the defendant recognized them as satellite photographs of the Soviet ship, taken by a secret method utilized by the Navy in its intelligence operations. Unobserved, he picked the photographs up, secreted them, and, after cutting off the borders of the photographs which recorded the words "Top Secret" and the Warning Notice as well as any indication of their source, mailed them to Derek Wood personally. *Jane's Defence Weekly* published the photographs in its weekly edition a few days later and made the pictures available to other news agencies.² One of these photographs was published on August 8, 1984 in the *Washington Post*. When the Navy officers saw the photographs, they began a search and discovered that the photographs had been stolen. An investigation was immediately begun to ascertain the identity of the thief.

In the investigation of the theft, the defendant was interrogated. He denied ever seeing the photographs and professed to know nothing about the purloining of the photographs.³ He persevered in this denial for some time, even going so far as to identify two fellow employees who he said should be questioned about the disappearance of the photographs. On August 22, 1984, the authorities seized the defendant's typewriter ribbon at work. An analysis of the ribbon revealed numerous letters to

² Shortly after this, Wood authorized a payment of \$300 to the defendant for his services during the period when the defendant had furnished him this information.

³ Even while the defendant was denying that he was responsible for delivery of the photographs to Derek Wood, he was telephoning Wood in London to exult that the theft of the photographs could not be traced to ["him"].

Jane's, including a summary of a secret report on the Severomorsk explosion. At about the same time, the Navy also was able to secure a return of the photographs from *Jane's*. A fingerprint was discovered on one of the photographs and the fingerprint was identified as that of the defendant. With this information, the FBI interviewed the defendant anew and the arrest of the defendant followed on October 1, 1984.⁴

When arrested, the defendant repeated his many denials of any connection with the theft of the photographs, though the arresting officer told him they had discovered his fingerprints on the photographs, demonstrating that he was not truthful when he said he had never seen the photographs. At this point, the defendant asked for a break in the interrogation. When the interview was resumed, the defendant renewed his denial of any connection with the theft. However, the arresting officers told him they did not accept his denial and one of the officers proceeded to summarize the material they had demonstrating the defendant's guilt. At the end of the summarization, one of the officers suggested that perhaps the defendant had felt that publicizing the progress the Soviets were making in developing a naval force would enable the Navy to obtain greater appropriations. The defendant seemed to jump at this suggestion. The Government did not accept such proposed excuse because of all the evidence it had indicating that the defendant was making available secret material to Wood and *Jane's* as a means of furthering his application for employment by *Jane's* and for payment. He, however, did not admit that he had sent other information to Wood, particularly that relating to the explosion at Severomorsk. The officers, however, that day obtained a second warrant to search the defendant's home. That search revealed the presence of two "secret" NISC intelligence

⁴ There was no objection entered by the defendant to the voluntariness or legality of the interrogation.

reports on the explosion at Severomorsk in an envelope marked "For Derek Wood only" in defendant's apartment.

At trial the Government offered evidence of defendant's admission of the theft of the photographs, of his cutting off the "Secret" and "Intelligence Service" statements on outer sides of the photographs and of his mailing of the photographs to Derek Wood. There was also proof of the defendant's attempt to secure employment with *Jane's* and of *Jane's* payment to the defendant. The Government presented proof of much of this in letters of the defendant to *Jane's* or Wood. The Government also offered in evidence the "Secret" military information found in the defendant's apartment. The defendant by way of defense presented witnesses who testified that the photographs and the secret documents found in the secretary of defendant's apartment involved nothing in the way of information that could be harmful to the United States or advantageous to the Soviet Union. The Government offered rebuttal testimony to demonstrate that the photographs, as well as the other governmental military defense secret documents found in defendant's apartment, provided information of advantage to the Soviet Union and against the interests of the United States. At the conclusion of the testimony, the defendant moved for a directed verdict. The motion was denied. The cause was then submitted to the jury which returned a verdict of guilty on all counts. Sentencing followed. The defendant has appealed his conviction on various claims of error. We find all the claims without merit and affirm the judgment of conviction.

The defendant's claim of error in denying his motion for a directed verdict naturally divides into two separate arguments: the first addresses the charges set forth in counts 1 and 3 of the indictment charging violations of sections 793(d) and (e); the second relates to counts 2 and 4 and charges violations of section 641. His conten-

tions with respect to the first claim under sections 793 (d) and (e) are that his activity as set forth in the two counts of the indictment was not within the literal or intended prohibitions of the relevant statutes and that, if within the prohibition of the statutes, whether read literally or in accord with legislative intent, such statutes are constitutionally invalid for vagueness and overbreadth. His position with reference to the prosecution under section 641 is that his conduct was simply not covered by the statutory prohibition. We shall discuss the two claims of error separately, beginning with those relating to the convictions under sections 793(d) and (e).

II.

The Convictions under Sections 793(d) and (e)

The initial defense of the defendant to his prosecution as stated in Counts 1 and 3 of the indictment (sections 793(d) and (e)), rests on what he conceives to be the meaning and scope of the two espionage statutes he is charged with violating. It is his position that, properly construed and applied, these two subsections of 793 do not prohibit the conduct of which he is charged in those counts. Stated more specifically, it is his view that the prohibitions of these two subsections are to be narrowly and strictly confined to conduct represented "in classic spying and espionage activity"⁵ by persons who, in the course of that activity had transmitted "national security secrets to agents of foreign governments with intent to injure the United States." He argued that the conduct of which he is charged simply does not fit within the mold of "classical spying" as that term was defined, since he transmitted the national security secret materials involved in the indictment to a recognized international naval news organization located in London, England, and not to an agent of a foreign power. In short, he leaked

⁵ Appellant's brief at 19-20.

to the press; he did not transmit to a foreign government. It therefore follows, under his construction of the statutes, that he was not guilty of their violation by his transmittal of this national security material, even though, under the government's proof, he had without authorization and clandestinely abstracted that material from the highly secret national intelligence office in which he worked and had, with reason to know that the publication of such materials reasonably would imperil the secrecy and confidentiality of the nation's intelligence-gathering capabilities, communicated such materials to one "not entitled to receive" them, reasonably knowing that the receiver of the material would publish it to all the world. Such is the initial ground on which the defendant declares that his motion for acquittal on the charges in counts one and three of the indictment (section 793(d) and (e)) was erroneously overruled.

The defendant does not predicate his argument relating to the scope of the statutory meaning on the actual facial language of the statutes themselves. It is fair to say he concedes that the statutes themselves, in their literal phrasing, are not ambiguous on their face and provide no warrant for his contention.⁶ Both statutes plainly apply to "whoever" having access to national defense information has under section 793(d) "wilfully communicate[d], deliver[ed] or transmit[ted] . . . to a person not entitled to receive it," or has retained it in violation of section 793(e). The language of the two statutes includes no limitation to spies or to "an agent of a foreign government," either as to the transmitter or the transmittee of the information, and they declare

⁶ Because we find the statute involved to be clear and unambiguous, the rule that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definitive language," *United States v. Bass*, 404 U.S. 336, 347 (1971), is therefore inapplicable here.

no exemption in favor of one who leaks to the press. It covers "anyone." It is difficult to conceive of any language more definite and clear.

Admitting, however, that the statutes construed literally as they are facially stated did apply to his conduct, the defendant posits that the legislative history demonstrates conclusively that these statutes, whatever their facial language, were to be applied only to "classic spying" and that they should be limited in their application to this clear legislative intent. The threshold difficulty in pressing this contention in this case is the rule that when the terms of a statute are clear, its language is conclusive and courts are "not free to replace . . . [that clear language] with an unenacted legislative intent." *INS v. Cardoza-Fonseca*, 480 U.S. —, —, 107 S.Ct. 1207, 1224 (Scalia, J. concurring) (1987). We have recently reaffirmed this rule in *United States v. James*, 834 F.2d 92 (4th Cir. 1987): "If the terms of this statute are unambiguous on their face, or in light of ordinary principles of statutory interpretation, then 'judicial inquiry is complete,' *Rubin v. United States*, 449 U.S. 424, 430 (1981); there is no need to consult legislative history nor to look to the 'rule of lenity' that is applied in construing ambiguous criminal statutes."⁷ This rule is departed from only in those rare and "exceptional circumstances," *Burlington Northern R. Co. v. B.M.W.E.*, — U.S. —, 107 S.Ct. 1841, 1860 (1987), where "a literal reading of [the] statute [will] produce a result 'demonstrably at odds with the intentions of its drafters,'" *United States v. Locke*, 471 U.S. 84, 93 (1985), or "where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute," *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978), citing *Commissioner v. Brown*, 380

⁷ See also *United States v. Bass*, 404 U.S. at 347, on "the rule of leniency," *supra*, Note 6.

U.S. 563, 571 (1965) or where "an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, [in which case] a less literal construction . . . [may] be considered." *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971). None of those "exceptional" conditions for a departure from the rule for literal construction exists in this case. For that reason there is no reason or warrant for looking to the legislative history of sections 793(d) and (e) to ascertain their meaning.

We are convinced, though, that the legislative history will not support the defendant's construction of sections 793(d) and (e). When a statute is a part of a larger Act as these statutes are, the starting point for ascertaining legislative intent is to look to other sections of the Act *in pari materia* with the statute under review. *Erlenbaugh v. United States*, 409 U.S. 239, 244-47 (1972).⁸ Section 793(d) was a part of the Espionage Act of 1917;⁹ section 793, however, is but one section of the Espionage Act of 1917; as equally as important a section of the Act was section 794. That Act, with its inclusion of 793(d) and 794, was submitted by the Department of Justice to the Congress. It had been drafted in the Department under the supervision of Assistant

⁸ *Erlenbaugh* is singularly like this case. The Court was construing a statute within an Act which sought to cover "a broad spectrum of 'unlawful activity,'" and to do this by attacking various aspects of such "activity" by separate provisions much as the Espionage Act does.

⁹ In the original Act of 1917, subsection (e) was not included; that subsection was added to the Act in the revision of 1950. Therefore, we refer, when speaking of the original Act, only in terms of section 793(d) but the same general considerations will apply to (e) since it was intended to supplement (d) by criminalizing retention.

Attorney General Charles Warren,¹⁰ a respected authority on constitutional law and the author of one of the most exhaustive and distinguished histories of the Supreme Court of the United States when published.¹¹ The purpose of the drafter was to break down the Act into very specific sections, prescribing separate and distinct offenses or crimes, and providing varying punishments for conviction under each section dependent on the seriousness of each of the offenses. This purpose of the Act was recognized by us in *Boeckenhaupt v. United States*, 392 F.2d 24, 28 (4th Cir. 1968), *cert. denied*, 393 U.S. 896 (1968) and we in that case upheld the power of the Congress so to break down the Espionage Act with separate and distinct sections, covering separate and distinct activities, saying:

We do not doubt the power and authority of Congress to break down into separate offenses various aspects of espionage activity and to make each separate aspect punishable as provided separately in 18 U.S.C. § 793 and 18 U.S.C. § 794.

It is obvious from this quotation from *Boeckenhaupt* that we in that case concluded that sections 793 and 794 were intended to and did cover separate and distinct offenses, with separate and distinct punishment provided for each offense. It is important, therefore, to ascertain the essential element in each section which made it separate and distinct from the other. Both statutes dealt in common with national defense materials and both statutes define the national interest materials covered by them in substantially the same language. Both prohibit

¹⁰ Rabban in 50 U.Chi.L.Rev. 1218 describes Warren as the "chief author" of the Act.

¹¹ Warren, *The Supreme Court in the History of the United States*, 3 vols., Little, Brown, 1923. Chief Justice Rehnquist cites this work in his bibliography in his recent publication, *The Supreme Court*, (Wm. Morrow, 1987).

disclosure. The two statutes differ—and this is the critical point to note in analyzing the two statutes—in their identification of the person to whom disclosure is prohibited. In section 793(d) that party to whom disclosure is prohibited under criminal sanction is one “not entitled to receive” the national defense material. Section 794 prohibits disclosure to an “agent . . . [of a] foreign government. . . .” Manifestly, section 794 is a far more serious offense than section 793(d); it covers the act of “classic spying”; and, because of its seriousness, it authorizes a far more serious punishment than that provided for section 793(d). In section 794, the punishment provided is stated to be “punish[ment] by *death* or by imprisonment for any term of years or for life” (*Italics added*). The punishment for violation of section 793(d) is considerably more lenient: A fine of “not more than \$10,000 or imprisoned not more than ten years, or both.” In short, section 794 covers “classic spying”; sections 793(d) and (e) cover a much lesser offense than that of “spying” and extends to disclosure to *any* person “not entitled to receive” the information. It follows that, considered in connection with the structure and purposes of the Espionage Act as a whole and with other sections of the Act *in pari materia* with it, section 793(d) was not intended to apply narrowly to “spying” but was intended to apply to disclosure of the secret defense material to *anyone* “not entitled to receive” it, whereas section 794 was to apply narrowly to classic spying.

Beyond this, the legislative record itself shows unmistakably that section 793(d) was intended to apply to disclosure simply to anyone “not entitled to receive” national defense information and was specifically *not* restricted to disclosure to “an agent . . . [of a] foreign government.” Thus, when the Espionage Act was submitted to the Senate by Senator Overman on behalf of the Senate Judiciary Committee he was queried on the

language in what was later codified as section 793(d) identifying the person to whom disclosure of secret national defense information was prohibited by that section; that is, he was asked to interpret the meaning of the phrase to "one not entitled to receive it" in the statute. His response was: "That (i.e., not entitled to receive) means against any statute of the United States or against any rule or regulation prescribed."¹² Senator (later Justice) Sutherland, also a member of the Judiciary Committee, observed at the time that "the phrase 'lawfully entitled' means nothing more and nothing less than that the particular information must have been forbidden, not necessarily by an act of Congress; because in dealing with military matters the President has very great powers."¹³ As so explained section 793(d) was accepted at the time by the Senate and this interpretation remained throughout the legislative process as the accepted definition of the meaning of the critical phrase. Later, when Congress was enacting a revision of the Espionage Act in 1950 by adding certain language to sections 793(d) and a new subsection (e), the House Judiciary Committee, in a report on the revised statute, had occasion to advert again to the meaning of the words "one entitled to receive" secret national defense information. It said:

Section 1(d) [793(d)] provides that those having lawful possession of the items described therein relating to the national defense who willfully communicate or cause to be communicated, or attempt to communicate them to an unauthorized person, or who willfully fail to deliver them to an authorized person on demand, shall be guilty of a crime.¹⁴

¹² 54 Cong. Rec. 3586 (1917).

¹³ 54 Cong. Rec. 3489 (1917).

¹⁴ H.R.Rep. No. 647, 81st Cong., 1st Sess. 1949. Obviously, the Committee has blended the later codified (e) with (d) at this point. Later (e) was made a new subsection.

It seems abundantly clear from this legislative history that sections 793(d) and (e) were not intended to be restricted in application to "classic spying" but were intended to criminalize the disclosure to anyone "not entitled to receive it."¹⁵ Accordingly, whether we look to the literal language of the statutes themselves, to the structure of the Act of which the sections were a part, or to the legislative history, sections 793(d) and (e) may not be limited in their scope to "classic spying," as the defendant argues.

¹⁵ Edgar and Schmidt, *The Espionage Statutes and Publications of Defense Information*, 73 Colum. L. Rev. 929, 1009 (1973), refer to the subsequent elimination from the Act, as finally enacted, of section 6 of the Act as drafted by the Department of Justice. This section 6 gave the President the power of censorship (prior restraint) through classification of defense information. The authors argue that this action of Congress in some way nullified the application of section 793(d).

We do not agree that the validity of section 793 depended on the enactment of Section 6 (the censorship provision). It must be remembered that section 793 was not new; it was merely a restatement of an earlier statute enacted in 1911 which criminalized disclosure of "any document . . . or knowledge of anything connected with national defense" to "any person not entitled to receive it." 36 Stat. 1084, section 1 (1911). That statute did not include any classification provision. It assumed, as Senator (later Justice) Sutherland later indicated in the discussion of the 1917 Act, that the administration—in particular—the President had authority to provide by "rule or regulation" who might "not lawfully receive" defense information under both the 1911 statute as well as under the 1917 statute and this authority did not depend on the enactment of section 6 of the Espionage Act of 1917. Certainly, if Congress had perceived that the failure to enact a classification act in the 1917 Act made section 793(d) a nullity, it would seem unlikely that Congress would in the 1950 revision have reenacted such a defective statute.

For an update of the article by Edgar and Schmidt, written after the district court trial in *Morison*, see Edgar and Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. C.R.-C.L.L.Rev. 349 (1986), particularly its discussion of "The Morison Case," pages 396 to 407.

As a final argument for narrowing the statutes to spying, the defendant points to the fact that only in one publicized case has the Government sought to prosecute anyone who had disclosed national defense information to one who was not "an agent of . . . a foreign government" but to one simply "not entitled to receive" the information and in that one case the prosecution had been dismissed for prosecutorial misconduct.¹⁶ It describes all the other prosecutions under the Espionage Act to involve disclosures or delivery to an agent of a foreign government. From this failure of prosecution of anyone for disclosure to one not an agent of a foreign government, the defendant would find proof that the government itself had considered the statutes, whatever their clear language, to apply solely to spying.

It is true that some prosecutions under these statutes have involved defendants alleged to have been acting for a foreign government though many of them also contained counts under sections 793(d) and (e) and that apparently only one prosecution of someone not a "spy" prior to this one has been initiated solely under these statutes—a prosecution that was aborted by prosecutorial misconduct.¹⁷ This statement, though strictly accurate, is misleading. It is true that the *Russo* case is the only case in which the prosecution was based solely on a violation of sections (d) and (e), but it is not correct to say that there have not been other cases in which the defendant was prosecuted under sections 793(d) and (e). Actually, *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1981), *cert. denied*, 454 U.S. 1144

¹⁶ *United States v. Russo*, No. 9373-WMB-CD (C.D. Cal.), dismissed for prosecutorial misconduct. *New York Times*, May 12, 1973.

¹⁷ Freedom of the press issues arise only when the enforcement of governmental secrecy impacts the press itself. Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U.Pa.L.Rev. 271, 277 (1971).

(1982), *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1979), *United States v. Boyce*, 594 F.2d 1246 (9th Cir. 1979) and *United States v. Smith*, 592 F. Supp. 424 (S.D. Va. 1984), *vacated and remanded on other grounds*, 780 F.2d 1102 (4th Cir. 1985), for instance, all included separate counts covering violations of sections (d) and (e) and the defendant was convicted under these counts. Practically all these cases included, of course, counts under section 794, too, and the defendants were convicted under these counts. But the important fact is that sections 793(d) and (e) are not treated as obsolete sections but have been the basis for prosecution in a number of cases. Moreover, Congress has not treated these statutes as obsolete. In the 1950 revision, it strengthened section 793 by adding (e) and, so strengthened, reenacted the section.

It is unquestionably true that the prosecutions generally under the Espionage Act, and not just those under section 793(d), have not been great. This is understandable. Violations under the Act are not easily established. The violators act with the intention of concealing their conduct. They try, as the defendant did in this case, to leave few trails. Moreover, any prosecution under the Act will in every case pose difficult problems of balancing the need for prosecution and the possible damage that a public trial will require by way of the disclosure of vital national interest secrets in a public trial. *Haig v. Agee*, 453 U.S. 280 (1981). All these circumstances suggest that the rarity of prosecution under the statutes does not indicate that the statutes were not to be enforced as written. We think in any event that the rarity of the use of the statutes as a basis for prosecution is at best a questionable basis for nullifying the clear language of the statute, and we think the revision of 1950 and its reenactment of section 793(d) demonstrate that Congress did not consider such statute meaningless or intend that the statute and its prohibitions were to be abandoned.

We therefore conclude that the legislative history does not justify the rewriting of this statute so as to nullify its plain language by limiting the statutes' application to the "classic" spy, even if we should assume—in our opinion, improperly—that it was appropriate to look to legislative history in order to ascertain the application of the plain literal language of sections 793(d) and (e). Nor do we find of any relevance whether there have been few prosecutions under these sections.

The legislative record is similarly silent on any Congressional intent in enacting sections 793(d) and (e) to exempt from its application the transmittal of secret military information by a defendant to the press or a representative of the press. Actually, there was little or no discussion of the First Amendment in the legislative record *directly* relating to sections 793(d) and (e) in this connection. There was, it is true, discussion of the First Amendment during the enactment of the Espionage Act of 1917 as a whole, but Professor Rabban, who reviewed carefully the legislative record, concluded that the focus of such discussion was on "[a] provision of the bill that would have allowed the President to censor the press dominated congressional discussion and was eventually eliminated by the conference committee" but "[i]ronically, the section of the bill that ultimately provided the basis for most of the prosecutions [which included section 793(d), subsection (e) not being added until the 1950 revision] hardly received any attention" in that discussion. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U.Chi.L.Rev. 1205, 1218 (1983). What legislative discussion of section 793(d) as there was related to the meaning of the phrase "one not entitled to receive it" and the term "information respecting the national defense." We deal with these discussions later in our disposition of consideration of the defendant's vagueness and overbreadth claims. There is, however, no evidence whatsoever in the legislative record that the Con-

gress intended to exempt from the coverage of section 793(d) national defense information by a governmental employee, particularly by one who had purloined from the files of the Department such information, simply because he transmitted it to a representative of the press.

But, though he cannot point to anything in the legislative record which intimates that Congress intended to exempt "leaks to the press," as the defendant describes it, he argues that, unless such an exemption is read into these sections they will run afoul of the First Amendment. Actually we do not perceive any First Amendment rights to be implicated here. This certainly is no prior restraint case such as *New York Times v. United States*, 403 U.S. 713 (1971), and *United States v. Progressive, Inc.*, 467 F.Supp. 990, and 486 F.Supp. 5 (W.D. Wis. 1979). It is a prosecution under a statute, of which the defendant, who, as an employee in the intelligence service of the military establishment, had been expressly noticed of his obligations by the terms of his letter of agreement with the Navy, is being prosecuted for purloining from the intelligence files of the Navy national defense materials clearly marked as "Intelligence Information" and "Secret" and for transmitting that material to "one not entitled to receive it." And the prosecution premises its prosecution on establishing that he did this knowingly and "wilfully" as evidenced by the manner in which he sought to conceal the "Secret" character of the information and the efforts he had taken to thwart any tracing of the theft to him. We do not think that the First Amendment offers asylum under those circumstances, if proven, merely because the transmittal was to a representative of the press. This conclusion in our view follows from the decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972).

In *Branzburg*, a news reporter had written, and his paper had published, an article describing certain criminal activity by two individuals witnessed by the reporter

under a pledge by him that he would protect the identity of the two offenders. A grand jury investigating the criminal activity subpoenaed the reporter in order to examine him on the identity of the two individuals and on their criminal activity. He sought to avoid the process on the ground that it would be a violation of his First Amendment right in news-gathering to require him to expose or identify his informants. He said to deny him protection in this regard would make it extremely difficult, if not impossible, for him to gather news. The Supreme Court denied the plea, and, in the course of so doing, made certain rulings which are pertinent in this connection. The Court, in Justice White's opinion in that case, said at 691-92:

It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons. To assert the contrary proposition

“is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . It suffices

to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing." *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419-20 (1918).¹⁸

United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir., cert. denied, 409 U.S. 1063 (1972)), though not as directly on point as *Branzburg*, is instructive in this regard. In that case, the United States sought an injunc-

¹⁸ Justice White in his opinion, did say that "news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." 408 U.S. at 707. And, in his concurring opinion, Justice Powell wrote to emphasize what he conceived to be the ruling of the Court. He said that newsmen had a constitutional right to be protected from harassment and he laid down a procedure in three steps for determining whether requiring the newsmen to expose his source constituted harassment. Under the test, the right to require the journalist to expose his source is one to be determined by considering "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." See *Larouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986). In a footnote on page 710 (*Branzburg*, 408 U.S.). Justice Powell expressed his disagreement with the dissenting opinion's ruling under which, as he viewed it, the trial court would be permitted "to protect newsmen from improper or prejudicial questioning" and declared that such ruling, if applied, would heavily subordinate "the essential societal interest in the detection and prosecution of crime" and "defeat a fair balancing" of the public interest.

None of these comments is relevant here, since it is the right of an informer, who had clearly violated a valid criminal law, and not a newsmen in issue. What is in issue here is precisely what Justice White declared in the quoted language, i.e., that the First Amendment, in the interest of securing news or otherwise, does not "confer a license on either the reporter or his news source to violate valid criminal laws."

tion to prevent a former Central Intelligence Agency [CIA] employee, who had signed a confidentiality agreement not to divulge naval classified information to which he had access from publishing classified CIA information after he left the CIA. The employee contended such a restraint violated his First Amendment rights. We affirmed the granting of the restraint. In so doing, the Court made this statement in response to the employee's First Amendment claim:

Thus Marchetti retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.

Subsequently in *Snepp v. United States*, 444 U.S. 507, 508 (1980), another case which, though not directly on point, is relevant here. There the Supreme Court reviewed the right of the United States to enforce an agreement by a former CIA employee, that he would not "publish . . . any information or material relating to the Agency, its activities . . . without specific prior approval by the Agency." The defendant had violated the agreement by publishing a book with some material relating to the CIA in it without securing CIA prior approval for such publication. The Supreme Court assumed the propriety of the restraint on publication in this agreement.

If *Branzburg*, *Marchetti*, and *Snepp* are to be followed, it seems beyond controversy that a recreant intelligence department employee who had abstracted from the government files secret intelligence information and had wilfully transmitted or given it to one "not entitled to receive it" as did the defendant in this case, is not entitled to invoke the First Amendment as a shield to immunize his act of thievery. To permit the thief thus to misuse

the Amendment would be to prostitute the salutary purposes of the First Amendment. Sections 793(d) and (e) unquestionably criminalize such conduct by a delinquent governmental employee and, when applied to a defendant in the position of the defendant here, there is no First Amendment right implicated. And it is not necessary to read into sections 793(d) and (e) an exception for national defense secret materials given the press, in order to sustain the constitutionality of such statutes. It is clear, as we have said, that Congress did not indicate anywhere in its legislative history that it intended to exempt from the coverage of section 793(d) and (e) one who, after stealing national defense secret material, "wilfully" delivered it to a representative of the press.

In summary, we conclude that there is no basis in the legislative record for finding that Congress intended to limit the applicability of sections 793(d) and (e) to "classic spying" or to exempt transmittal by a governmental employee, who entrusted with secret national defense material, had in violation of the rules of his intelligence unit, leaked to the press. Nor do we find any authority for the proposition that Congress could not validly prohibit a government employee having possession of secret military intelligence material from transmitting that material to "one not entitled to receive it," whether that recipient was the press or not, without infringing the employee's rights under the First Amendment. *Branzburg* is definitely to the contrary.

Even though the statutes are not to be confined strictly to "classic" spying and even though they contain no implicit exception in favor of transmittal of secret defense material to the press, the defendant argues that the statutes themselves, are constitutionally infirm for vagueness and overbreadth and the prosecutions under them should be stricken. We, therefore, proceed to address these attacks on the constitutionality of the statutes.

While admittedly vagueness and overbreadth are related constitutional concepts, they are separate and distinct doctrines, subject in application to different standards and intended to achieve different purposes.¹⁹ The vagueness doctrine is rooted in due process principles and is basically directed at lack of sufficient clarity and precision in the statute;²⁰ overbreadth, on the other hand, would invalidate a statute when it "infringe[s] on expression to a degree greater than justified by the legitimate governmental need" which is the valid purpose of the statute.²¹ Because of the differences in the two concepts, we discuss them separately in disposing of the defendant's argument, beginning with the defendant's claim of vagueness in sections 793(d) and (e) as applied to him.

¹⁹ The difference in the two doctrines was stated by Justice Marshall in *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982):

A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process.

See also, G. Gunther, *Constitutional Law*, p. 1156 (Foundation Press, 11th ed. 1985):

An "overbreadth" challenge should not be confused with one based on "vagueness," though a challenger will often assert both grounds of invalidity. An unconstitutionally vague statute, like an overbroad one, creates risks of "chilling effect" to protected speech and produces rulings of facial invalidity. But a statute can be quite specific—i.e., not "vague"—and yet be overbroad. The vagueness challenge rests ultimately on the procedural due process requirement of adequate notice, though it is a challenge with special bite in the First Amendment area.

²⁰ *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

²¹ Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 Nw.U.L.Rev. 1031, 1034 (1984).

It has been repeatedly stated that a statute which "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, *supra*, 269 U.S. at 391; *Smith v. Goquen*, 415 U.S. 566, 572-73 (1974); *Parker v. Levy*, 417 U.S. 733, 752 (1974). It is sufficient, though, to satisfy requirements of "reasonable certainty," that while "the prohibitions [of a statute] may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest . . . [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise." *Arnett v. Kennedy*, 416 U.S. 134, 159 (1974). And, in any event, it is settled beyond controversy that if one is not of the rare "entrapped" innocents but one to whom the statute clearly applies, irrespective of any claims of vagueness, he has no standing to challenge successfully the statute under which he is charged for vagueness. *Parker v. Levy*, *supra*, 417 U.S. at 756. Finally, the statute must be read in its entirety and all vagueness may be corrected by judicial construction which narrows the sweep of the statute within the range of reasonable certainty.

Applying these standards for measuring a statute for vagueness, we turn to the specific provisions of sections 793(d) and (e) which the defendant would find unconstitutionally vague. He identifies two terms in the statutes which he says are vague within the constitution prohibition. The first of these is the phrase, "relating to the national defense." The defendant concedes that this phrase was assailed as unconstitutionally vague in *United States v. Dedeyan*, 584 F.2d 36, 39 (4th Cir. 1978), a prosecution under section 793(f) (2). In responding to

that contention, we stated in *Dedeyan* that the term "relating to the national defense" was not "vague in the constitutional sense." The defendant would distinguish this case from *Dedeyan* because the prosecution there was under subsection (f) (2) which contains a scienter requirement.²² Subsections (d) and (e), however, have the same scienter requirement as subsection (f) (2). They prescribe that the prohibited activity must be "wilful." The district judge defined "wilfully" in his jury instructions as follows:

All four of these counts as I have referred to them in my description of them to you used the word *wilfully*. An act is done *wilfully* if it is done voluntarily and *intentionally* and with the *specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law.* With respect to the offenses that are charged in the indictment specific intent must be proved beyond a reasonable doubt before a defendant can be convicted. Specific intent, as that term suggests, requires more than a general intent to engage in a certain conduct. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids. It is the government's burden to present affirmative evidence of the existence of the required unlawful intent. Again, in determining whether or not the intent existed you may look at all the facts and the circumstances involved in the case. (*Italics added*).

Moreover, in his instructions, the district judge also gave this definition of "national defense":

And that term, the term national defense, includes all matters that directly or may reasonably be connected with the defense of the United States against

²² Appellant's brief at 31.

any of its enemies. It refers to the military and naval establishments and the related activities of national preparedness. To prove that the documents or the photographs relate to national defense there are two things that the government must prove. First, it must prove that the disclosure of the photographs would be potentially damaging to the United States or might be useful to an enemy of the United States. Secondly, the government must prove that the documents or the photographs are closely held in that [they] . . . have not been made public and are not available to the general public.²³

Combining the two instructions, the one on wilfulness and the one defining national defense, the district judge in this case gave precisely the instruction on this vagueness issue that we approved in *United States v. Truong Dinh Hung*, *supra*, 629 F.2d at 919.²⁴

The defendant would, however, argue that the district judge's jury instructions which we find removed any possibility of vagueness in the application of the statutes, actually imparted vagueness into the phrases "related to national defense" and "wilfulness." His argument on the term "related to national defense" is directed at the district judge's instruction that, in order to "prove that the documents or photographs" herein involved "related to

²³ J.A. at pp. 1123-24.

²⁴ See also *Ellsberg v. Mitchell*, 709 F.2d 51, 59 (D.C.Cir. 1983) *cert. denied*, 465 U.S. 1038 (1984), in which the issue arose whether certain material dealing with intelligence operations met the test of "relating to national defense" and whether as such it was protected as a state secret. The district court had found it did and, on appeal, the Court of Appeals reviewed *in camera* the material, finding that it did, saying that "there is a 'reasonable danger' that revelation of the information in question would either enable a sophisticated analyst to gain insights into the nation's intelligence-gathering methods and capabilities or would disrupt diplomatic relations with foreign governments."

national defense," the government must prove "the disclosure of the photographs would be *potentially damaging* to the United States or might be useful to the enemy of the United States." He attacks the use of the phrase "potentially damaging," italicized as above as too indefinite; he contends the word "actual" should have been used, for "potentially." The phrase "potentially damaging" was used by Justice White in his concurring opinion in *United States v. New York Times*, *supra*, 403 U.S. at 740, and in *Dedeyan* the district judge used the term in his instructions, an instruction we expressly approved on appeal.²⁵ Beyond this, when both the government and defense counsel were examining witnesses on the issue whether the photographs and documents in issue in this case were "damaging to the United States," they used the phrase "potentially damaging." Thus, as demonstrated by the way in which they presented the question to the jury, the defendant's counsel posed the issue as "potentially damaging" and it would not seem that the defendant may now complain because the district judge adopted the qualifying phrase as used by his counsel in developing the record for submission of the issue to the jury. Moreover, as we have said, this exact language in this same context was approved by us in *Dedeyan*. The defendant, however, would dismiss this fact with the comment that *Dedeyan* was an espionage case and that instructions which may be permissible in an espionage case "are not sufficient in a leak case where First Amendment interests must be weighed in the balance." He supports this argument with a citation to a law review article in 9 Yale J. World Pub. Order, at 87 (1982), which he contends states that "no First Amendment values are at stake" in an espionage case. This argument, however, overlooks the fact that the prosecution of the defendant was not under section 794 of the Act but was under section 793(f) (2), a section related to the

²⁵ 584 F.2d at 39.

very sections under which the defendant in this case is charged. We find no error in the instruction and, particularly in its use of the word "potentially" in the district court's instruction.

The second point of the defendant goes to the definition of "wilfully" as included in the district court's jury instructions. The defendant asserts that the district court, in its instructions in this regard, had said that "[p]roof of the most laudable motives, or any motive at all, is irrelevant under the statute." In his brief, he gives three record citations in support of his contention on this point. Two of these citations are extracted from the district court's opinion on the defendant's motion to dismiss the indictment herein. In the argument on his motion, the defendant, through his counsel, urged the district court to adopt the definition of "wilfully" as used in *Hartzel v. United States*, 322 U.S. 680, 686 (1944). That was a "pure speech" case and not one which was "in the shadow of the First Amendment" as here. The defendant in that case had written and published a scurrilous pamphlet attacking our allies in World War II and favoring peace with Germany in order to eliminate a war "between whites." He was indicted under the Espionage Act for "wilfully" attempting to "cause insubordination, disloyalty, mutiny or refusal of duty, in the military or naval forces of the United States" The Supreme Court found the statute under which the defendant was indicted required "a specific intent or evil purpose" to violate the statute. It said: "That word [wilfully], when viewed in the context of a highly penal statute restricting freedom of expression, must be taken to mean *deliberately and with a specific purpose to do the acts proscribed by Congress.*" 322 U.S. at 686. (Italics added). The district court in this case construed the "wilfully" language in *Hartzel* to require "that the prohibited act be done deliberately and with a specific purpose to do that which

was proscribed." That is precisely the manner in which *Hartzel* said the instruction should be given and that was the precise instruction that was given in this case.

As a matter of fact, the instruction as given does not include the language, "no showing of evil purpose is required under this statute," or the language, "proof of the most laudable motives, or any motive at all, is irrelevant under the statute;"²⁶ the instruction as given conformed essentially to the language of the Supreme Court in *Hartzel*.

In summary, we find no basis in this case for the invalidation of the statutes for either vagueness or overbreadth or for voiding the defendant's conviction under 793(d) and (e).

Moreover, the defendant in this case knew that he was dealing with national defense material which a "foreign government in possession of . . . would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country's efficiency in ferreting out foreign espionage."

²⁶ It is interesting, though, that the House Committee, in its Report on section 793(d) in connection with the 1950 revision of the Act used this language (H.R.Rep. No. 647, 81st Cong., 1st Sess. (1949), at 3-4:

Subsection 1(d) [793(d)] provides that those having lawful possession of the items described therein relating to the national defense who willfully communicate or cause to be communicated, or attempt to communicate them to an unauthorized person, or who willfully fail to deliver them to an authorized person on demand, shall be guilty of a crime. No showing of intent is necessary as an element of the offense, provided the possessor has reason to believe that the material communicated could be used to the detriment of the United States or to the advantage of a foreign nation. The absence of a requirement for intent is justified, it is believed, in contrast to the express requirement of intent in subsections 1(a), 1(b) and 1(c), in view of the fact that subsection 1(d) deals with persons presumably in closer relationship to the Government which they seek to betray.

Gorin v. United States, 312 U.S. 19, 29 (1941). He was an experienced intelligence officer. He had been instructed on all the regulations concerning the security of secret national defense materials. See *United States v. Jolliff*, 548 F.Supp. 229, 230 (D.Md. 1981); *United States v. Wilson*, 571 F.Supp. 1422, 1426-27 (S.D.N.Y. 1983). With the scienter requirement of sections 793(d) and (e), bulwarked with the defendant's own expertise in the field of governmental secrecy and intelligence operations, the language of the statutes, "relating to the national security" was not unconstitutionally vague as applied to this defendant and this is especially true, since the trial judge, under proper instructions, left for the jury, as he should have, the determination whether the materials involved met the test for defense material or information and the jury found they did. *Gorin v. United States*, *supra*, 312 U.S. at 32 ("The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined"); *United States v. Boyce*, 594 F.2d 1246, 1251 (9th Cir. 1979); Note, *The Constitutionality of Section 793 of the Espionage Act and Its Application to Press Leaks*, 33 Wayne L. Rev. 205, 214-17 (1986). Further, the materials involved here are alleged in the indictment and were proved at trial to be marked plainly "Secret" and that classification is said in the Classification Order to be properly "applied to information, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security."²⁷ That definition of the material may be considered in reviewing for constitutionality the statute under which a defendant with the knowledge of security classification that the defendant had is charged. *United States v. Walker*, 796 F.2d 43, 47 (4th Cir. 1986). We are thus convinced that

²⁷ Exec. Order No. 12,356, 3 C.F.R. 166 (1982), reprinted in 50 U.S.C. § 401 (1982).

the statutory language "relating to the national defense," as applied to the defendant, is not constitutionally vague under our prior decisions reviewing section 793.

The defendant would also indict the phrase "entitled to receive" as vague. The defendant finds this phrase vague because it does not spell out exactly who may "receive" such material. However, any omission in the statute is clarified and supplied by the government's classification system provided under 18 U.S.C. App. 1 for the protection of the national security and the district judge so ruled.²⁸ And courts have recognized the legitimacy of looking to the classification system for fleshing out the phrases such as that in question here. We did it specifically in *Truong* (629 F.2d at 919) and the court in *McGehee v. Casey*, 718 F.2d 1137, 1143-44 (D.C.Cir. 1983) did it. As Professor Tamanaha said:

[s]ince 1940 the primary method of classifying information has been through Executive Order. The current Order on classification [Exec.Order No. 12,356, 3 C.F.R. 166] (1982) was promulgated by President Reagan in mid-1982. Essentially, under this Order information may be classified if "its disclosure reasonably could be expected to cause damage to the national security. . . . [and] harms to national security" include impairment of defense capabilities, disclosure of intelligence gathering techniques or capabilities, and disruption of diplomatic relations with other countries.

Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 Am.J.Crim. Law 277, 284-85 (1986).

²⁸ For a discussion of the statutory and constitutional authority for the classification system prior to the enactment of the Classified Information Procedure Act, 18 U.S.C.App. 1, see Note, *The National Security Interest and Civil Liberties*, 85 Harv.L.Rev. 1130, 1198, et seq. (1972).

Under this Executive Order, the classification "Secret," which was the one given all the information involved in this prosecution, was to "be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security." Exec. Order No. 12,356, 3 C.F.R. 166 (1982), *reprinted in* 50 U.S.C. § 401 (1982). Those Regulations were well known to the defendant and he had agreed in writing to abide by them. The defendant worked in a vaulted area where, as the district court observed, "even other employees of NISC were not allowed to enter," much less to read or transmit intelligence materials being reviewed therein. Certainly the phrase "not authorized to receive it" was well understood by the defendant. As to him, the statute was not vague in its reference to "one not entitled to receive it."

In *United States v. Girard*, 601 F.2d 69 (2d Cir. 1979), *cert. denied*, 444 U.S. 871, in which there was a prosecution under 18 U.S.C. § 642 involving a sale or disclosure to an outsider of confidential law enforcement (DEA) records, the defendant raised a similar objection to that asserted by the defendant in this regard. The court found neither vagueness nor overbreadth in the statute.

We agree with this reasoning of the *Girard* court, which reasoning also lies at the heart of the decision in *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983), and was adopted by us in *Truong* (629 F.2d at 919 n.10) as we have already observed. In *McGehee v. Casey*, the court was dealing with a claim of vagueness in the phrase "national security." It found that the term could be fleshed out by reference to the very Classification Order to which we look in clarifying the term "entitled to receive." 718 F.2d at 1143-44. We therefore hold that the words "entitled to receive" in the statute in this case can be limited and clarified by the Classification Regulations and, as so limited and clarified, are not

vague. *United States v. Jolliff*, 548, F.Supp. 229, 230 (D.C.Md. 1981); *United States v. Wilson*, 571 F.Supp. 1422, 1426-27 (S.D.N.Y. 1983); See Wayne L. Rev., *supra* at 218.

Turning to the claim of overbreadth, we note at the outset that, unlike the situation presented by a vagueness claim,²⁰ the overbreadth doctrine "is an exception to our traditional rules of practice," *Broadrick v. Oklahoma*, 413 U.S. 601, and has not been recognized outside the limited context of the First Amendment. *United States v. Salerno*, — U.S. —, —, 107 S.Ct. 2095, 2100 (1987); *Schall v. Martin*, 467 U.S. 253, 269 n.18 (1984); *New York v. Ferber*, 458 U.S. 747, 767-74 (1982). So limited, it is "strong medicine," to be applied "with hesitation and then only as a last resort," and only if the statute cannot be given a narrowing construction to remove the overbreadth. *New York v. Ferber*, *supra* at 769. Thus, in *McGehee v. Casey*, 718 F.2d at 1146, Judge Wald held that "overbreadth analysis should not be deployed when a limiting construction could save the rule from its constitutional defects," citing *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965), and *Cox v. New Hampshire*, 312 U.S. 569 (1941). Moreover, a distinction must be made in this connection between statutes which regulate "conduct in the shadow of the First Amendment" and those which regulate pure speech. The rule makes a distinction "where conduct and not merely speech is involved." In the conduct context, "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in

²⁰ There is one clear difference between vagueness and overbreadth doctrine: "Overbreadth analysis is perceived as an exception to the rule that an individual is not ordinarily permitted to litigate the rights of third parties; vagueness is not perceived as such an exception." L. Tribe, *supra* § 12-28, at 719-20. This, however, is not an invariable rule but one whose application depends on the facts of each case. *McGehee v. Casey*, 718 F.2d at 1146.

the shadow of the First Amendment," and in such a case "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. at 615. To be "substantial" in that context, the statute must reach "a substantial number of impermissible applications. . . ." *New York v. Ferber*, 458 U.S. at 771.³⁰

An authority on the scope of the doctrine has formulated a statement of what he characterizes as the three "fundamental circumstances" under which the doctrine may be applied after discussing the foregoing rules. These circumstances are: "(1) when 'the governmental interest sought to be implemented is too insubstantial, or at least insufficient in relation to the inhibitory effect on first amendment freedoms'; (2) when the means employed bear little relation to the asserted governmental interest; and (3) when the means chosen by the legislature do in fact relate to a substantial governmental interest, but that interest could be achieved by a 'less drastic means'—that is, a method less invasive of free speech interests." Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 Nw.U.L.Rev. 1031, 1035 (1983).

Unquestionably, these statutes are expressions of an important and vital governmental interest and have a direct relation to the interests involved here, and are, therefore, without the first and second requirement for the application of the overbreadth doctrine. It is thus plain that the first two circumstances posited by Professor Redish are met; the only "circumstances," under which these statutes could be voided for overbreadth, would be that the substantial governmental interest re-

³⁰ The "upshot" of *Ferber* and cases subsequent to it, as Professor Tribe puts it, "is a mounting burden on the *individual* to show that the apparent inhibition of protected expression [in the statute under review] is in fact highly probable and socially significant." L. Tribe, *American Constitutional Law*, *supra*, § 12-25, at 714.

flected in the statutes could be achieved by means "less invasive of free speech interests."

It has been said that the court, by narrowing constructions of a statute, may bring the statute within conformity with the rule requiring that it be applied by means "less invasive of free speech interests." The defendant would find a violation of the overbreadth doctrine in the failure of either the statute or in judicial rulings construing and limiting the statute to employ "a method less invasive of free speech interests" than is represented in the terms "national defense" and "one not entitled to receive." So far as any overbreadth in the term "national defense" was concerned, it was reasonably narrowed by the district court in its instructions to confine national defense to matters under the statute which "directly or may reasonably be connected with the defense of the United States," the disclosure of which "would be potentially damaging to the United States or might be useful to an enemy of the United States" and which had been "closely held" by the government and was "not available to the general public." This narrowing of the definition of "national defense" information or material removed any legitimate overbreadth objection to the term. The phrase "to one not entitled to receive" was defined in the legislative history of the statute to mean one "not authorized to receive," as we have already observed, and "not authorized to receive" was clearly covered by the Classification Act, to which we have already referred, because of its classification as "Secret" national defense materials. It follows that there is no overbreadth in the two terms either as they may have been narrowed by court instruction or as fleshed out by the Classification Act.

III.

Conviction of Defendant under section 641

The defendant has also appealed his conviction under 18 U.S.C. § 641. That statute, as it relates to this case,

imposes criminal penalties on anyone who "embezzles, steals, purloins or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof. . . ." Count Two of the indictment herein charged the defendant with "knowingly and wilfully embezzl[ing], steal[ing], purloin[ing], and convert[ing] to his use and the use of another," and did knowingly sell "thing[s] of value to the United States . . . three photographs, each classified 'Secret,' said photographs being the property of the Naval Intelligence Support Center and having a value greater than \$100. In Count Four he was similarly charged with stealing and selling "portions of Two Naval Intelligence Support Center Weekly Wires," classified "Secret" and the property of the Naval Intelligence Support Center. Both counts cite as supporting authority 18 U.S.C. § 641. At trial ample evidence was established sustaining the charges.

It will be noted at the outset that section 641, on which these counts of the indictment rest, is not a disclosure statute such as section 793(d) and (e); it is a criminal statute covering the theft of government property. It is written in broad terms with the clear intent to sweep broadly as the Supreme Court recognized in *Morissette v. United States*, 342 U.S. 246, 271 (1952):

What has concerned codifiers of the larceny type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances.

Manifestly, as the Court in *Morissette* said the statute was not intended simply to cover "larceny" and "em-

bezzlement" as those terms were understood at common law but was also to apply to "acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." 342 U.S. at 269, n. 28. Following this analysis, Judge Winter in *Truong* wrote that section 641 was not to be confined in its application to "the technical definition of the tort of conversion." 629 F.2d at 924.

The amicus *Washington Post*, though argues that the statute has "as an essential element a permanent or substantial deprivation of identifiable property interests,"³¹ and since the property right asserted by the government relates to "a possessory right to information or intellectual property," *Id.* at 42, section 641 is without application. Whether pure "information" constitutes property which may be the subject of statutory protection under section 641, a matter which has largely been clarified by the recent case of *Carpenter v. United States*, — U.S. —, 108 S.Ct. 316 (1987), is not, however, involved here. We are dealing with specific, identifiable tangible property, which will qualify as such for larceny or embezzlement under any possible definition of the crime of theft. The photographs and the reports were clearly taken illegally and by stealth and disposed of by the defendant to a third party for personal gain, both monetary and in request for a job. That would seem to represent a textbook application of that crime set forth in section 641.

The defendant would deny the application of the statute to his theft because he says that he did not steal the material "for private, covert use in illegal enterprises" but in order to give it to the press for public dissemination and information. He claims that to criminalize his conduct under section 641 would be to invade his first amendment rights. The mere fact that one has stolen a

³¹ Brief of Amicus, *Washington Post, et. al.* at 41.

document in order that he may deliver it to the press, whether for money or for other personal gain, will not immunize him from responsibility for his criminal act. To use the first amendment for such a purpose would be to convert the first amendment into a warrant for thievery. As the Supreme Court made clear in *Branzburg*, 408 U.S. 665, the First Amendment may not be used for such a sordid purpose, either to enable the governmental employee to excuse his act of theft or to excuse him, as in *Snepp* and *Marchetti*, from his contractual obligation.

Actually, it may be noted parenthetically that the government contends, and the record affords substantial evidence in support of such contention, that the defendant in this case was not fired by zeal for public debate into his acts of larceny of government property; he was using the fruits of his theft to ingratiate himself with one from whom he was seeking employment. It can be said that he was motivated not by patriotism and the public interest but by self-interest.

The defendant's reference to *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969), and to *Dowling v. United States*, 473 U.S. 207 (1985) is misplaced. Those cases involved copying. The defendant's possession in both cases was not disturbed. This case does not involve copying; this case involves the actual theft and deprivation of the government of its own tangible property. We find no error in the conviction of the defendant under section 641.

IV.

Evidentiary Objections of the Defendant

Finally, we review the defendant's objections to the evidentiary rulings of the district judge. In passing on such exceptions it must be borne in mind that "the appraisal of the probative and prejudicial value of evidence under Rule 403 is entrusted to the sound discretion of the

trial judge; absent extraordinary circumstances, the Courts of Appeal will not intervene in its resolution." *United States v. MacDonald*, 688 F.2d 224, 227-28 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983). Moreover, any error in admission or exclusion is subject to the harmless error test: "whether it is probable that the error could have affected the verdict reached by the particular jury in the particular circumstances of the trial." *United States v. Davis*, 657 F.2d 637, 640 (4th Cir. 1981). Measured by these standards we find no reversible error in the district judge's evidentiary rulings.

The first evidentiary objection we consider was directed at the trial court's refusal to admit evidence on how many persons there were in government and under government contracts with a "Secret" classification. The trial judge ruled such evidence inadmissible. We find this ruling not erroneous. The point in this case was not how many people in government could have qualified for receipt of this information (*i.e.*, entitled to receive "Secret" material); the decisive point is that Derek Wood and *Jane's Defence Weekly*, the ones to whom the defendant transmitted the secret material in this case, did not have a "Secret" clearance and were thus, to the knowledge of the defendant, not qualified to receive the information. To have gone into all the evidence of the number of employees in the Government who had "Secret" clearances and the methods of issuing such classification and the limitations that were often attached to the issuance of such classification in particular cases would have cluttered the record with needless and irrelevant evidence, the only result of the introduction of which would have been to confuse the basic issues in this case. Moreover, the development of such evidence would likely have been extensive, covering various agencies and the methods of assigning clearances with various limitations by the various agencies and defense contractors. The district judge acted properly in denying the introduction of such evidence.

The district judge also ruled that evidence of the foreign countries with whom the Government exchanged intelligence information and also evidence of possible countermeasures the Soviets had taken to counter the information derived by them from the disclosure of the materials in question here was inadmissible. There is no contention that any foreign government was responsible for the disclosure of the information which the defendant disclosed. Further, disclosure of the nations with whom we may have programs for the exchange of intelligence information would create grave and serious diplomatic concerns for us and would, without more, not suggest that, as a result of disclosure to any foreign government with whom we had confidential exchange of intelligence, the information involved here had become publicly known. Moreover, to require the Government to produce evidence of countermeasures by the Soviets would likely force the Government to disclose its ongoing intelligence operations in a critical area and might seriously compromise our intelligence-gathering capabilities. Such evidence would add little or nothing to defendant's defense but could be of great damage to our intelligence capabilities. We think the district judge correctly refused to be diverted into such excursions in the presentation of evidence which offered no particular benefit to defendant's defense but which would pose the likelihood of grave injury to our national interests.

The defendant sought to introduce into evidence the testimony of two newspaper reporters that an employee in the Executive Branch of the Government had leaked "to them the information in *Jane's Defence Weekly*, involved in this prosecution." The catch to their testimony was that they would refuse to identify their source. A ruling was requested allowing them to refuse to answer an inquiry on the source of the alleged disclosure on cross-examination. The district judge ruled that, if the defendant intended to offer such testimony, the Government would be given the right to require the witnesses

to identify on cross-examination their informant. In essence, the defendant sought to develop through the testimony of these witnesses that some of the information on which the prosecution was based had been disclosed by an employee in the Executive Branch but the Government was to be denied the right to the name of the so-called "leaker" so that it could test the correctness of the testimony. We agree with the district judge that, if the defendant wished to use such witnesses, he had to afford the Government the opportunity to rebut the testimony and the Government could do this only if given the name of the informant. There was no other way the Government could rebut such testimony.

Another objection of the defendant is directed at the district judge's disallowance of the question on the defendant's "patriotism, his devotion to a strong navy, and his propensity not to do anything potentially damaging to the United States or advantageous to a foreign power."³² He identifies in his brief in this court the evidence he wished to introduce in this area. Such evidence consisted of the testimony of two witnesses, i.e., that of witnesses Jackson, who was the managing director of *Jane's Publishing Company*, and Derek Wood, the editor of *Jane's Defence Weekly*. Both lived in England; neither of these witnesses had an intimate relationship with Morison. Their contacts personally with the defendant were rare and abbreviated; there was, however, correspondence between them and Mr. Morison. It was not a "lot" since the correspondence between Morison and *Jane's* was generally with Captain Moore, another employee of *Jane's*. Their testimony related basically to their correspondence with the defendant in the latter's capacity as their American "stringer" whose material was used by *Jane's* under an agreement between *Jane's* and the defendant. The defendant was paid for these services as his material sent to *Jane's* was accepted and published in one of *Jane's* publications. Jackson testified, primarily on the basis of

³² Brief for Appellant at 50.

the material *Jane's* accepted from the defendant, that he had never "seen him [i.e., the defendant] suggest anything or do anything that would suggest a lack of commitment to the best interests of the United States" (App. at 693) and that he had never seen him "do anything against the best interests of the United States" (App. at 721). In a leading question that offended the rule against leading questions, Jackson was asked by defendant's counsel

Q: And he [referring to the defendant] is a patriot of the first rank, would you agree?

A: Yes.³³

Jackson, though, testified categorically that his company did not "knowingly publish classified information" and it did not "because there would be a reason, first of all, why they would have been classified and secondly, because we work on the basis of trust."³⁴ Finally, Mr. Jackson was asked this clincher:

Q: Assuming that the jury in this case concludes beyond a reasonable doubt that the defendant Samuel L. Morison is the person who furnished the photographs to *Jane's Defence Weekly*—and by "the photographs," I'm referring to Government Exhibits 1-A, 1-B and 1-C—and assuming further that the jury finds beyond a reasonable doubt that the photographs were classified at the time, and assuming further that this jury finds beyond a reasonable doubt that the defendant knew they were classified at the time, and assuming further that this jury finds beyond a reasonable doubt that the defendant had no authorization to furnish notices, furnish those photographs to you, would you conclude that his furnishing of those photographs was in the best interests of the United States?

³³ App. at 671.

³⁴ App. at 722.

MR. MUSE: Objection.

A: That's a multipart question. I will try to remember what you said. If those photographs were not authorized for release, he knew they were not authorized for release, then I have to conclude that he's not acting in the best interest of the United States.

The district court struck all this testimony, including the very damaging testimony of Jackson that the defendant's conduct as it was conclusively proved in the case was "against the best interests of the United States." In striking all this testimony the district court filed a written opinion incorporating his ruling, which opinion is published in 622 F.Supp. 1009. We are satisfied with the district court's reasoning and decision on this point. We may add that, had the district court retained in the record all the evidence on this point, including Jackson's final opinion on the conduct of the defendant for which he was being tried, the result would have clearly been far more harmful to defendant's defense than helpful. Under those circumstances, it could not be said that the striking of such testimony "could have affected the verdict reached by the particular jury" in this case. *See United States v. Davis, supra.*

Finally, the defendant complains in his brief of what he says was the district court's refusal to qualify the witness Anderson as an expert, entitled to give opinions that the *Weekly Wires* and the photographs were not potentially damaging, that the *Weekly Wires* were not worth more than \$100 and would have contradicted in some way the rebuttal testimony of Hazzard and Kerr.³⁵ This was not, however, the ground on which the defendant at trial proffered Anderson as an expert witness. At that time, he said that he was offering Anderson as an expert on "the use and analysis of intelligence informa-

³⁵ Brief at 48-49.

tion concerning Soviet military matters," and the district court's ruling in response to this proffer was that Anderson would be "accepted as a facts witness relating to these matters."³⁶ And Anderson was permitted to testify that it was his opinion with his background of experience that the materials in question had "not told the Soviets anything that they did not already know"³⁷ and that such materials did not "reveal anything about our intelligence collection capabilities that [was] not otherwise known to the public [which would include, of course the Soviet Union]."³⁸ Moreover, the defendant offered three expert witnesses—Inslow, Pike and Richelson—on the "analysis of intelligence information concerning Soviet military matters." Even had Anderson been accepted as an expert, his testimony on the matters for which he was proffered by the defendant as an expert witness on would have clearly been simply cumulative. So far as any contention that Anderson qualified as a witness on the monetary value of the information disclosed, it is important to note two facts: first, the defendant was never proffered as a witness on value; and, second, the defendant made no showing of any qualification of Anderson to testify as an expert on the value of the material. We accordingly find no reversible error in the rulings of the district court in this regard.

Conclusion

Having reviewed all of the defendant's claims of error herein and found them without merit, we affirm the judgment of conviction of the defendant herein.

AFFIRMED.

³⁶ App. at 961.

³⁷ App. at 966.

³⁸ App. at 969.

WILKINSON, Circuit Judge, concurring:

I concur in Judge Russell's opinion. I believe his analysis of the relevant statutes, instructions, and evidentiary rulings is both careful and correct.

Morison's constitutional challenge is specifically phrased in terms of notice, statutory vagueness, and overbreadth. Yet much of the argument in this case has been cast in broader terms. Amici, *The Washington Post, et al.*, warn that this case "will affect, and perhaps dramatically alter, the way in which government officials deal with the press, the way in which the press gathers and reports the news, and the way in which the public learns about its government." The news organizations are necessarily raising their concerns as amici, not as parties. No member of the press is being searched, subpoenaed, or excluded, as in a typical right of access case. Morison as a source would raise newsgathering rights on behalf of press organizations that are not being, and probably could not be, prosecuted under the espionage statute.

Perhaps because these press rights of access are not personal to Morison, we have thus been asked to import a weighty assortment of First Amendment values into Morison's notice, vagueness, and overbreadth claims. Although this is more freight than the Supreme Court has lately allowed these doctrines to carry, I would assume for purposes of this discussion that Morison is entitled to raise the serious claims urged by the press amici. Indeed, I cannot fully express my own view of this case without addressing these claims, not as unspoken aspects of a vagueness and overbreadth analysis, but directly and on their own terms.

I.

I do not think the First Amendment interests here are insignificant. Criminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity. There exists the

tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself. Public debate, however, is diminished without access to unfiltered facts. As James Madison put it in 1822: "A popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." 9 Writings of James Madison 103 (G. Hunt ed. 1910). We have placed our faith in knowledge, not in ignorance, and for most, this means reliance on the press. Few Americans are acquainted with those who make policy, fewer still participate in making it. For this reason, the press provides the "means by which the people receive that free flow of information and ideas essential to effective self-government." *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words "national security." National security is public security, not government security from informed criticism. No decisions are more serious than those touching on peace and war; none are more certain to affect every member of society. Elections turn on the conduct of foreign affairs and strategies of national defense, and the dangers of secretive government have been well documented. Morison claims he released satellite photographs revealing construction of the first Soviet nuclear carrier in order to alert the public to the dimensions of a Soviet naval buildup. Although this claim is open to serious question, the undeniable effect of the disclosure was to enhance public knowledge and interest in the projection of Soviet sea power such as that revealed in the satellite photos.

The way in which those photographs were released, however, threatens a public interest that is no less im-

portant—the security of sensitive government operations. In an ideal world, governments would not need to keep secrets from their own people, but in this world much hinges on events that take place outside of public view. Intelligence gathering is critical to the formation of sound policy, and becomes more so every year with the refinement of technology and the growing threat of terrorism. Electronic surveillance prevents surprise attacks by hostile forces and facilitates international peacekeeping and arms control efforts. Confidential diplomatic exchanges are the essence of international relations.

None of these activities can go forward without secrecy. When the identities of our intelligence agents are known, they may be killed. When our electronic surveillance capabilities are revealed, countermeasures can be taken to circumvent them. When other nations fear that confidences exchanged at the bargaining table will only become embarrassments in the press, our diplomats are left helpless. When terrorists are advised of our intelligence, they can avoid apprehension and escape retribution. *See generally* Note, 71 Va.L.Rev. 801, 801-03 (1985) (citing numerous leaks that have compromised a major covert salvage operation, exposed the development of the secret Stealth aircraft, and stymied progress on an international treaty). The type of information leaked by Morison may cause widespread damage by hampering the effectiveness of expensive surveillance systems which would otherwise be expected to provide years of reliable information not obtainable by any other means.

Public security can thus be compromised in two ways: by attempts to choke off the information needed for democracy to function, and by leaks that imperil the environment of physical security which a functioning democracy requires. The tension between these two interests is not going to abate, and the question is how a responsible balance may be achieved.

II.

Courts have long performed the balancing task where First Amendment rights are implicated. The Supreme Court has often had to balance the value of unrestricted newsgathering against other public interests. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (access to judicial proceedings); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (search of newspaper office); *Branzburg v. Hayes*, 408 U.S. 665 (1971) (disclosure of press sources to grand jury). “[A] fair reading of the majority’s analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated.” *Saxbe*, 417 U.S. at 859-60 (Powell, J., dissenting). In these cases the courts have taken an “aggressive” balancing role, directly comparing the interest served by restraints on the press with the interest in unhindered newsgathering.

Although aggressive balancing may have characterized the judicial role in other contexts, I am not persuaded that it should do so here. In the national security field, the judiciary has performed its traditional balancing role with deference to the decisions of the political branches of government. Presented with First Amendment, Fourth Amendment, and other constitutional claims, the Court has held that government restrictions that would otherwise be impermissible may be sustained where national security and foreign policy are implicated. *See, e.g., Snepp v. United States*, 444 U.S. 507 (1980). In the terminology associated with a balancing analysis, “the Government has a compelling interest in protecting . . . the secrecy of information important to our national security.” *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Snepp*, 444 U.S. at 509 n.3). Recognition of such a compelling state interest reflects an understanding of the institutional limitations of the judiciary and a regard for the separation of powers.

The aggressive balancing that courts have undertaken in other contexts is different from what would be required here. The government's interest in the security of judicial proceedings, searches by law enforcement officers, and grand jury operations presented in *Richmond Newspapers*, *Zurcher*, and *Branzburg* are readily scrutinized by courts. Indeed, they pertain to the judiciary's own systems of evidence. Evaluation of the government's interest here, on the other hand, would require the judiciary to draw conclusions about the operation of the most sophisticated electronic systems and the potential effects of their disclosure. An intelligent inquiry of this sort would require access to the most sensitive technical information, and background knowledge of the range of intelligence operations that cannot easily be presented in the single "case or controversy" to which courts are confined. Even with sufficient information, courts obviously lack the expertise needed for its evaluation. Judges can understand the operation of a subpoena more readily than that of a satellite. In short, questions of national security and foreign affairs are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); see *Agee*, 453 U.S. at 292.

The balancing process must thus accord Congress latitude to control access to national security secrets by statute and the executive some latitude to do so through the classification scheme. I do not come to this conclusion solely because the enumerated powers for the conduct of foreign affairs are lodged in the executive and legislative branches. The First Amendment presupposes that the enumerated powers—the raising of armies no less than the raising of revenue—will be executed in an atmosphere of public debate. I also recognize that the

democratic accountability of the legislature and executive is not a wholly satisfactory explanation for deference in the area of national security secrets. Years may pass before the basis of portentous decisions becomes known. The public cannot call officials to account on the basis of material of whose existence and content it is unaware. What is more, classification decisions may well have been made by bureaucrats far down the line, whose public accountability may be quite indirect.

Rather, the judicial role must be a deferential one because the alternative would be grave. To reverse Morison's conviction on the general ground that it chills press access would be tantamount to a judicial declaration that the government may never use criminal penalties to secure the confidentiality of intelligence information. Rather than enhancing the operation of democracy, as Morison suggests, this course would install every government worker with access to classified information as a veritable satrap. Vital decisions and expensive programs set into motion by elected representatives would be subject to summary derailment at the pleasure of one disgruntled employee. The question, however, is not one of motives as much as who, finally, must decide. The answer has to be the Congress and those accountable to the Chief Executive. While periods of profound disillusionment with government have brought intense demands for increased scrutiny, those elected still remain the repositories of a public trust. Where matters of exquisite sensitivity are in question, we cannot invariably install, as the ultimate arbiter of disclosure, even the conscience of the well-meaning employee.

III.

The remaining question, then, is whether the application of this particular law to this particular defendant took place in accordance with constitutional requirements. For the reasons so carefully analyzed in Judge Russell's

opinion, I am persuaded that it did. Neither Morison's due process claims concerning notice and vagueness nor his First Amendment overbreadth argument supports reversal of his convictions.

Morison's claim that he was not on notice that his conduct might lead to prosecution is unpersuasive. Morison was a trained national intelligence officer with a Top Secret security clearance. He signed a disclosure agreement specifically stating that criminal prosecution could result from mishandling of secret information, and he clipped explicit classification warnings from the borders of the satellite photographs before sending them to *Jane's*. Morison cannot use the fact that prosecutions under the espionage statute have not been frequent to shield himself from the notice provided by these facts and the clear language of the statute.

The careful limiting instructions given by the district court suffice to cure any vagueness in sections 793(d) and (e). The district court's definition of "relating to the national defense" and of the scienter requirement in the statute are consistent with our holdings in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), and *United States v. Dedeyan*, 584 F.2d 36 (4th Cir. 1978). The district court's definition of "entitled to receive" by reference to the classification scheme is both logical and supported by precedent. See, e.g., *Truong*, 629 F.2d at 919 n.10. Vagueness that might exist around the edges of these statutes does not absolve conduct at the core of the statutory proscription. *Parker v. Levy*, 417 U.S. 733, 756 (1974).

Morison's contention that potential future applications of the espionage statute to other sources render it invalid as to him is not, ultimately, persuasive. Amici, *The Washington Post*, et al., describe various press reports of illegal domestic surveillance by the CIA, design defects of the Abrams M-1 tank, Soviet arms control violations,

and military procurement cost overruns. Amici contend that if the sources of such reports face prosecution under hypothetical applications of the statute, then "corruption, scandal, and incompetence in the defense establishment would be protected from scrutiny."

As the above examples indicate, investigative reporting is a critical component of the First Amendment's goal of accountability in government. To stifle it might leave the public interest prey to the manifold abuses of unexamined power. It is far from clear, however, that an affirmance here would ever lead to that result. The Supreme Court has cautioned that to reverse a conviction on the basis of other purely hypothetical applications of a statute, the overbreadth must "not only be real, but substantial as well." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). I question whether the spectre presented by the above examples is in any sense real or whether they have much in common with Morison's conduct. Even if juries could ever be found that would convict those who truly expose governmental waste and misconduct, the political firestorm that would follow prosecution of one who exposed an administration's own ineptitude would make such prosecutions a rare and unrealistic prospect. Because the potential overbreadth of the espionage statute is not real or substantial in comparison to its plainly legitimate sweep, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 615-16. On the facts of Morison's case, I agree with Judge Russell's conclusion that the limiting instructions given by the district court were sufficient.

It is through notice, vagueness, and overbreadth analysis that the judiciary effectuates the interests of the First Amendment in cases where classical balancing does not take place. The notice requirement insures that speakers will not be stifled by the fear they might commit

a violation of which they could not have known. The district court's limiting instructions properly confine prosecution under the statute to disclosures of classified information potentially damaging to the military security of the United States. In this way the requirements of the vagueness and overbreadth doctrines restrain the possibility that the broad language of this statute would ever be used as a means of punishing mere criticism of incompetence and corruption in the government. Without undertaking the detailed examination of the government's interest in secrecy that would be required for a traditional balancing analysis, the strictures of these limiting instructions confine prosecution to cases of serious consequence to our national security. I recognize that application of the vagueness and overbreadth doctrines is not free of difficulty, and that limiting instructions at some point can reconstruct a statute. In this case, however, the district court's instructions served to guarantee important constitutional safeguards without undermining the legitimate operation of the statute.

IV.

It may well be, as the government contends, that Morison released the satellite photos and weekly wires in order to receive cash and ingratiate himself with *Jane's* to gain future employment. But I do not think that Morison's motives are what is crucial here. Morison's conduct has raised questions of considerable importance. At the same time, it is important to emphasize what is *not* before us today. This prosecution was not an attempt to apply the espionage statute to the press for either the receipt or publication of classified materials. See *New York Times Co. v. United States*, 403 U.S. 713, 714-763 (1971) (separate opinions expressing the views of the Justices on such applications of the espionage statute). Neither does this case involve any prior restraint on publication. *Id.* Such questions are not pre-

sented in this case, and I do not read Judge Russell's opinion to express any view on them.

The parties and amici have presented to us the broader implications of this case. We have been told that even high officials routinely divulge classified public secrets, that alternative sanctions may be imposed on such behavior, and that an affirmance here presents a vital threat to newsgathering and the democratic process. On the other side of the argument lies the commonsense observation that those in government have their own motives, political and otherwise, that ensure the continuing availability of press sources. "The relationship of many informants to the press is a symbiotic one." *Branzburg*, 408 U.S. at 694. Problems of source identification and the increased security risks involved in discovery and trial make proceedings against press sources difficult. Moreover, the espionage statute has no applicability to the multitude of leaks that pose no conceivable threat to national security, but threaten only to embarrass one or another high government official.

What Justice Potter Stewart once said in an address to the Yale Law School has meaning here:

So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.

But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy

The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely,

as so often in our system we must, on the tug and pull of the political forces in American society.

Stewart, "*Or of the Press*", 26 Hastings L.J. 631 (1975).

What is at issue in this case is the constitutionality of a particular conviction. As to that, I am prepared to concur with Judge Russell that the First Amendment imposes no blanket prohibition on prosecutions for unauthorized leaks of damaging national security information, and that this particular prosecution comported with constitutional guarantees.

JAMES DICKSON PHILLIPS, Circuit Judge, concurring specially:

I concur in the judgment and, with only one reservation, in Judge Russell's careful opinion for the court. My reservation has to do only, but critically, with that opinion's discussion of the first amendment issues raised by the defendant. While these are ultimately discussed and rejected, there are earlier suggestions that as applied to conduct of the type charged to Morison, the Espionage Act statutes simply do not implicate any first amendment rights. On that point, I agree with Judge Wilkinson's differing view that the first amendment issues raised by Morison are real and substantial and require the serious attention which his concurring opinion then gives them. I therefore concur in that opinion.

If one thing is clear, it is that the Espionage Act statutes as now broadly drawn are unwieldy and imprecise instruments for prosecuting government "leakers" to the press as opposed to government "moles" in the service of other countries. Judge Wilkinson's opinion convincingly demonstrates that those statutes can only be constitutionally applied to convict press leakers (acting for whatever purposes) by limiting jury instructions which sufficiently flesh out the statutes' key element of "relating to the national defense" which, as facially stated, is in my view, both constitutionally overbroad and vague. Though the point is to me a close one, I agree that the limiting instruction which required proof that the information leaked was either "potentially damaging to the United States or might be useful to an enemy" sufficiently remedied the facial vice. Without such a limitation on the statute's apparent reach, leaks of information which, though undoubtedly "related to defense" in some marginal way, threaten only embarrassment to the official guardians of government "defense" secrets, could lead to criminal convictions. Such a limitation is therefore necessary to define the very line at which I believe the first amendment precludes criminal prosecu-

tion, because of the interests rightly recognized in Judge Wilkinson's concurring opinion. This means, as I assume we reaffirm today, that notwithstanding information may have been classified, the government must still be required to prove that it was *in fact* "potentially damaging . . . or useful," *i.e.*, that the fact of classification is merely probative, not conclusive, on that issue, though it must be conclusive on the question of authority to possess or receive the information. This must be so to avoid converting the Espionage Act into the simple Government Secrets Act which Congress has refused to enact.

Here, were we writing on a clean slate, I might have grave doubts about the sufficiency of the limiting instruction used in Morison's trial. The requirement that information relating to the national defense merely have the "potential" for damage or usefulness still sweeps extremely broadly. One may wonder whether any information shown to be related somehow to national defense could fail to have at least some such "potential." But we do not write on an absolutely clean slate, for this instruction has been approved by this court in both *Dedeyan* and *Truong Dinh Hung* as an appropriately limiting one in application of these and related sections of the Espionage statute. While both of those applications were to "classic spy" conduct, the precedential effect of those decisions cannot be disregarded.

Judge Wilkinson expresses the view that because judicious case-by-case use of appropriate limiting instructions is available, "the espionage statute has no applicability to the multitude of leaks that pose no conceivable threat to national security, but threaten only to embarrass one or another high government official." On this basis he concludes that these statutes can properly be applied to press leakers (whether venally or patriotically or however motivated) without threatening the vital news-gathering functions of the press. He supports this with

a convincing discussion of the practical dynamics of the developed relationship between press and government officials to bolster his estimate that this use of the statute will not significantly inhibit needed investigative reporting about the workings of government in matters of national defense and security.

By concurring in his opinion, I accept that general estimate, which I consider to be the critical judicial determination forced by the first amendment arguments advanced in this case. But in doing so, I observe that jury instructions on a case-by-case basis are a slender reed upon which to rely for constitutional application of these critical statutes; and that the instructions we find necessary here surely press to the limit the judiciary's right and obligation to narrow, without "reconstructing," statutes whose constitutionality is drawn in question.

In the passage quoted by Judge Wilkinson, Justice Stewart observed that "Congress may provide a resolution . . . through carefully drawn legislation." That surely would provide the better long-term resolution here.

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Crim. No. Y-84-00455

UNITED STATES OF AMERICA

v.

SAMUEL LORING MORISON

March 12, 1985

MEMORANDUM AND ORDER

JOSEPH H. YOUNG, District Judge.

Samuel Loring Morison is charged with releasing copies of three photographs, classified "secret," to *Jane's Defense Weekly* ("Jane's"), a British magazine. Morison had been associated with *Jane's* prior to the time that the photographs were released and was paid as an American "editor" of *Jane's*. Count I of the Indictment charges that Morison wilfully caused the photographs, which allegedly related to the national defense, to be transmitted to a person not entitled to receive them, in violation of 18 U.S.C. § 793(d). Count II charges Morison with the theft or conversion of those same three photographs, in violation of 18 U.S.C. § 641.

Morison is also charged with two other counts arising out of a separate incident. During the spring of 1984

there was an explosion at Severomorsk, a Soviet naval base in the Kola Peninsula. Subsequently, analysts at the Naval Intelligence Support Center ("NISC"), where Morison was employed, did a report, based on classified information, concerning the nature and extent of the damage to the base. That analysis was reported in one of NISC's "Weekly Wires." When Morison's residence was searched, pursuant to a warrant following his arrest, xeroxed pages containing that analysis were found in an envelope marked "Derek Wood." Derek Wood was later found to be one of Morison's contacts at *Jane's*. When the typewriter ribbon from Morison's office was analyzed it was discovered that Morison had typed a letter to Derek Wood summarizing the contents of that analysis. Count III charges Morison with unauthorized possession of classified documents, wilfully retaining them and failing to deliver them to the officer or employee of the United States entitled to receive them, in violation of 18 U.S.C. § 793(e). Count IV charges Morison with theft and disposal or conversion of government property, namely those "Weekly Wires" containing the intelligence analysis of the Severomorsk incident.

Defendant Morison has filed this motion to dismiss the Indictment based on a number of grounds. He claims that the law under which he is charged in Counts I and III of the Indictment, 18 U.S.C. § 793(d) and (e), is unconstitutionally vague and overbroad and that the law, which is part of the so-called "espionage act," was intended to punish only "espionage" in the classic sense of divulging information to agents of a hostile foreign government and not to punish the "leaking" of classified information to the press. Morison also claims that 18 U.S.C. § 641, which punishes the theft or conversion of government property without authorization, does not apply to the theft of information and that therefore Counts II and IV should be dismissed.

The relevant law under which Morison is charged in Counts I and III is found in 18 U.S.C. § 793(d) and (e),

part of a broader espionage statute. Section 793(d) provides that whoever, having authorized possession or control of a document or photograph, relating to the national defense, or information relating to the national defense, which information the possessor had reason to believe could be used to the injury of the United States, and who wilfully delivers it to any person not entitled to receive it, or wilfully retains it and fails to deliver it to the officer or employee entitled to receive it, is guilty of the offense. Section 793(e) is basically the same provision, except that it refers to situations where the defendant is in unauthorized possession. Defendant Morison is charged under § 793(d) with wilfully delivering the photographs to *Jane's*, which was not entitled to receive them, and under § 793(e) with wilfully retaining and failing to return the Weekly Wires containing intelligence information. Morison's possession of the intelligence reports at his home is said to be unauthorized.

Morison is also charged under 18 U.S.C. § 641 with theft of government property, the photographs and intelligence analysis which were allegedly sent to *Jane's*. 18 U.S.C. § 641 is a general statute covering all thefts and embezzlements of government property or "things of value." Penalties for violation of the statute are determined in part by the value of the property which the government alleges was greater than \$100, based in part on the payments that Morison received from *Jane's* for that information.

Morison alleges that 18 U.S.C. § 793(d) and (e) are impermissibly vague and overbroad, and that given their status as espionage statutes they are not properly applied to a "leak" case. He also asserts that § 793(e) is unconstitutional because it requires a surrender of one's Fifth Amendment right against self-incrimination. Morison also alleges that 18 U.S.C. § 641 is impermissibly vague and overbroad as applied to the theft of government information. Finally, if all else fails, Morison seeks to

reserve the right to present evidence on the issue of selective prosecution, acknowledging that he does not have a factual basis for that defense.

Morison's first attack on Sections 793(d) and (e) is that the term "relating to the national defense" is impermissibly vague and fails to give fair warning of what documents are covered by the statute. This argument relies heavily on the Supreme Court's reasoning in *Gorin v. United States*, 312 U.S. 19 (1941), which arose under the predecessor statute to § 793. In that case, the Court held there was no uncertainty in a statute prohibiting the delivery of information relating to the national defense where the statute contained obvious "delimiting words" requiring intent or reason to believe that the information is to be used to the injury of the United States. Morison argues that the Court in *Gorin* declined to hold the statute void for vagueness only because of the presence of the intent requirement, and that because §§ 793(d) and (e) do not contain such an intent requirement, the statutory provisions are void for vagueness.

The government has responded to this assertion by noting that the statute does contain an intent requirement, although not the same requirement that was contained in the *Gorin* statute. Sections 793(d) and (e) require that the acts be done "wilfully;" if the transmitted item is "information" "which information the possessor had reason to believe could be used to the injury of the United States." That requirement is not present for the delivery or retention of photographs or documents. The government contends that if a defendant, "such as Morison, wilfully transmits photographs relating to the national defense to someone who is known by the defendant not to be entitled to receive it, the defendant has violated § 793(d) no matter how laudable his motives." According to the plain language of the statute, the government's interpretation is correct.

Thus, although there is an intent requirement, the "delimiting" intent to injure the United States is not present in this statute and defendant argues that it is therefore impermissibly vague. Unfortunately for the defendant's argument, the Fourth Circuit has addressed this issue and found that a similar statute was not unconstitutionally vague. In *United States v. Dedeyan*, 584 F.2d 36 (4th Cir.1978), the Fourth Circuit construed 18 U.S.C. § 793(f), which provides that anyone with authorized possession of documents or writing relating to the national defense, having knowledge that the same had been illegally removed or abstracted and failed to report it, is guilty of a violation of the statute. The statute does not require any intent to injure the United States or any "guilty knowledge" that the document or writing was removed or abstracted by an enemy of the United States. Defendant in that case was charged with knowing that his cousin, later found to be a Russian agent, had photographed classified information, and with failing to report it. On appeal, the defendant charged that the term "relating to the national defense" was impermissibly vague unless a scienter requirement was added. The Court found that the scienter requirement in the statute was sufficient: knowledge of the document's illegal abstraction. The Court concluded, "[t]he defendant's claim of vagueness is directed at the phrase 'relating to the national defense' in the statute. We do not find this phrase vague in the constitutional sense." That holding applies with equal force in this case, where the only scienter required is the wilful transmission or delivery to one not entitled to receive it. As the District Court noted in *Dedeyan*, "[c]ertainly injury to the United States could be inferred from conduct of the sort charged," whether that conduct involves photographing documents by one foreign agent or release of national defense information to the press and public, where many foreign agents and governments can have access to the information.

In his reply brief, defendant argues that the holding in *Dedeyan* should not be controlling because *Dedeyan* involved the classic espionage situation, while this case arguably does not. In *Dedeyan*, the defendant was accused of knowing that the document had been abstracted by his cousin, a Russian spy, and failed to report it. Here, the situation is slightly different because it does not involve a foreign agent or the classic spy scenario. Rather, the defendant is accused of releasing classified information to the press, thus exposing that classified information to every foreign agent and government, hostile or not, in the world.

Defendant cites an impressive wealth of legislative history suggesting that § 793 was only meant to apply in the classic espionage setting. Most of defendant's opposition to the statute's application centers on this point. He cites phrases in the legislative history indicating that only spies and saboteurs need fear prosecution under this statute, and argues that since he is neither a spy nor a saboteur, this prosecution is unwarranted.

While it is, of course, impossible to determine exactly what Congress meant when it passed the statute, it is more likely that the type of activity that defendant allegedly engaged in was meant to be covered. Congress could very easily have meant, when it used the word "spy," one who used his position and classified security clearance to obtain information to which he would not otherwise be entitled and release it to the world.*

* The dictionary (Webster's Third New International Dictionary [unabridged] (1971)) defines "spy" as "one who keeps secret watch upon a person or thing to obtain information; one engaged in seeking strategic unrelated information about a country or people by secret methods of infiltration or investigation." Only one definition mentions the requirement of transmission to foreign agents which defendant argues is so crucial to the congressional intent: "one who acts in a clandestine manner or on false pretenses to obtain information in the zone of a belligerent with intention of communicating it to the hostile party." It is also conceivable that

If Congress had intended this situation to apply only to the classic espionage situation, where the information is leaked to an agent of a foreign and presumably hostile government, then it could have said so by using the words "transmit . . . to an agent of a foreign government." In 18 U.S.C. § 794, Congress did precisely that, proscribing the gathering or delivering of national defense information to a foreign government or to an agent, employee, subject or citizen thereof. Section 793, on the other hand, proscribes disclosure of national defense information to those "not entitled to receive it."

Finally, the danger to the United States is just as great when this information is released to the press as when it is released to an agent of a foreign government. The fear in releasing this type of information is that it gives other nations information concerning the intelligence gathering capabilities of the United States. That fear is realized whether the information is released to the world at large or whether it is released only to specific spies.

Defendant claims that by enforcing this statute in the present case involving the release of information to the press, this Court would be writing a new law, a task, it is argued, better left to the legislature. On the contrary, to read into the statute the requirement that it apply only in "classic espionage" cases where the disclosure is to an agent of a foreign government would be to ignore the plain language of the law as presently written. The statute clearly applies to disclosures of information relating to the national defense to those "not

Congress, in 1950 when the statute was amended, would have considered a person who "leaked" national defense information to the press a "saboteur" or one who would "weaken the internal security of the Nation" and thus subject to prosecution under the provision of the statute.

The best guidance in determining the intent of Congress, and the first place for this Court to look in construing the statute, is the wording of the statute itself.

entitled to receive" such information. Any requirement that those not entitled to receive also be foreign agents must be added, if at all, by Congress.

Defendant also claims that if §§ 793(d) and (e) are construed to apply to "leaks," then these statutes would be duplicative of other statutes Congress has chosen to pass. Defendant argues, therefore, that Congress could not have intended § 793(d) and (e) to have the meaning we now give it. In fact, the statutes which the defendant cites (Atomic Energy Act, 42 U.S.C. §§ 2274, 2277, 50 U.S.C. § 601) fill in gaps and prevent disclosures which would *not* otherwise be covered by § 793(d) and (e). The Atomic Energy Act, for example, prevents the disclosure of restricted data concerning nuclear weapons, material and energy to "any person." There is no requirement that the data relate to the national defense, and disclosure to any person is prohibited. Similarly, 50 U.S.C. § 601 prohibits the disclosure of the names of covert agents. Such information may not relate to the national defense; further, § 793(d) and (e) would require proof of reason to believe that disclosure would injure the United States, and 50 U.S.C. § 601 may be designed to do away with that requirement. Thus, § 793(d) and (e), as construed by this Court, is not duplicative of other statutes, and there is no reason to believe that Congress did not intend § 793 to have this meaning.

OVERBREADTH

Defendant also contends that Sections 793(d) and (e) are unconstitutionally overbroad because they proscribe disclosure and retention of documents relating to the national defense "which are perfectly harmless and clearly protected by the First Amendment as well as those which might lawfully be regulated because of a compelling governmental interest in secrecy." This argument has been considered and rejected by the Fourth Circuit. When faced with this issue in *Dedeyan*, the Court attempted

to cure any possible overbreadth by using a limiting jury instruction. The definition of "relating to the national defense" which, following *Dedeyan*, would be used in the Fourth Circuit would cure any possible defect of overbreadth. In *Dedeyan*, the trial court gave a limiting instruction requiring that to show relationship to the national defense, the government must show various things, see 584 F.2d at 39-40. The Fourth Circuit approved that procedure, noting that this limiting charge cured any problem of overbreadth. 584 F.2d at 40. Such an instruction would alleviate the possibility that any harmless material would be covered by the statute, as defendant has claimed.

Defendant next argues that the phrase "not entitled to receive" is also unconstitutionally vague, in that it fails to inform a citizen of whether his conduct is prohibited. Morison claims that because the phrase "not entitled to receive" has never been conclusively defined, there is an ambiguity in the statute that leads to an uncertainty as to the statute's application. Morison notes that the General Counsel to the CIA has informed Congress that §§ 793(d) and (e) may not apply to leaks to the press depending on the interpretation of that phrase. The Department of Justice, however, has clearly indicated its belief that these sections apply to "leaks" to the press. Morison argues that the fact that these two executive departments disagree is a clear indication that the average citizen cannot possibly be sure of the statute's application. The government has responded by pointing out that under no circumstances is that statute unconstitutionally vague when applied to this defendant, who clearly knew by virtue of his security clearance and his signing of an agreement that classified information and documents were not to be transmitted to outsiders. Morison worked in a vaulted area, which even other employees of NISC were not allowed to enter, and therefore certainly should have known that documents were not to be disseminated to outsiders. The phrase "not entitled to

receive" may therefore be given content by reference to the classification system. In *United States v. Girard*, 601 F.2d 69, 71-72 (2d Cir.1979), a case concerning the theft of government (DEA) information from a DEA computer, the Second Circuit held:

appellants, at the time of the crime a current and a forcer employee of the DEA, must have known that the sale of DEA confidential law enforcement records was prohibited. The DEA's own rules and regulations forbidding such disclosure may be considered as both a delimit and a clarification of the conduct proscribed by the statute. [citations omitted]

Applying that same principle here, it seems clear that authorization to possess documents and entitlement to receive them may be determined by reference to the classification system under which the defendant worked.

Defendant argues that the classification system should not be used to give content to the phrase "not entitled to receive" because Congress has on several occasions declined to enforce the classification system with criminal sanctions, and the court in giving the phrase that construction would do what Congress had declined to do. On the contrary, the President has established a system of classification and this Court may enforce it. Congress has recognized the classification system and given its support to the determination by Executive Order of who is authorized to possess and who is not authorized to possess classified information, *i.e.*, in the Freedom of Information Act, the Internal Security Act of 1950, and in 50 U.S.C. § 783(b), which makes criminal the communication of classified information to certain persons unless authorized by the President or relevant officials. As noted in the Report of the Interdepartmental Group on Authorized Disclosure of Classified Information (March 12, 1982) ("the Willard Report"), filed by and relied on heavily by the defendant, Executive Orders have provided for a system of classification to guard national security information. Since

these executive orders are issued in fulfillment of the President's Constitutional responsibilities, they have the force and effect of law. The Willard Report also states clearly that "classified information" is covered by §§ 793 (d) and (e) unless "it could not fairly be characterized as 'relating to the national defense.'" The phrase "not entitled to receive" is not at all vague when discussed in reference with the classification system, which clearly sets out who is entitled to receive (those with proper security clearances and the "need to know") and Morison was certainly aware of the proscripts of the classification system.

Defendant has argued that even if this construction is given to the statute, the statute is impermissibly vague because then an individual would be left to make the determination of who has the "need to know," and therefore the right to receive classification information. There can be no argument of such vagueness here, where the defendant released the information to *Jane's*, which had neither a security clearance or a need to know.

The Fourth Circuit has also relied on the classification system to approve a trial court's definition of "unauthorized possession" in terms of appropriate security clearance and performance of official duties. See *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), in which the court noted:

Section 793(e) contains another possible ambiguity. It punishes only those who have "unauthorized possession" of national defense information. The trial judge provided adequate content for this phrase by advising the jury that a person would have authorized possession if he had an appropriate security clearance and if he gained access to the document because it was necessary to the performance of his official duties.

629 F.2d at 919, n.10. A similar limiting instruction in this case could cure the ambiguity of which the defendant complains.

SELF-INCRIMINATION

Morison also argues that § 793(e) is unconstitutional because it requires a sacrifice of the Fifth Amendment right against self-incrimination. Section 793(e) provides that one who is in unauthorized possession of a document or information and who wilfully retains it or fails to deliver it to the official entitled to receive it is guilty of an offense. Defendant argues that this is "tantamount to a requirement that one who determines that he is in unauthorized possession of documents covered by this section must disclose this fact to a government official." The government has responded by noting that the documents could be returned anonymously, an argument which the defendant calls "ingenuous." There is some merit to the defendant's argument that an anonymous return would not solve the problem, because the government could find out through finger-print analysis, etc. who had been in possession of the document. One wonders, however, who the government would prosecute after going to all that trouble. The statute does not punish or prohibit simply being in unauthorized possession; the statute punishes those who, finding themselves in unauthorized possession, wilfully retain or fail to return to the proper government official. Therefore, an individual would not incriminate himself by publicly returning a document to the proper official, because the second element of the crime would not be present. The statute on its face therefore does not require a defendant to sacrifice his rights against self-incrimination and is not unconstitutional.

CONSTRUCTION OF "WILFULLY"

In his reply brief, the defendant has argued that the Indictment should be dismissed because the government

has no intention of proving the requisite level of culpability. This is evident, argues the defendant, from the government's contention that it must only show that the disclosure or retention was done "wilfully," which the government defines as "an intentional violation of a known legal duty," citing *United States v. Pomponio*, 429 U.S. 10, 12 (1976). Morison argues that the word "wilfully" connotes some evil purpose, and that since the government has indicated that it need not prove evil purpose, the Indictment must be dismissed.

It seems clear that either under the government's definition of "wilfully" or under Morison's definition, the government need not prove evil purpose. Morison may plan to argue that he disclosed these photographs in the interest in public discussion of defense, that his motives were only the best, and that therefore he is not guilty.

Morison urges that the requirement that acts be done wilfully translates to a requirement that they be done with some evil purpose and that if he acted with an intent to inform the public he did not have the requisite evil purpose. He urges this Court to adopt a construction of the word wilfully used in *Hartzel v. United States*, 322 U.S. 680, 686 (1944). In that case, the court, noting that the statute was a highly penal one restricting freedom of expression, held that the word "wilful" must be taken to mean "deliberately and with a specific purpose to do the acts proscribed by Congress." In another sentence, the Court referred to this "evil purpose;" however, in the rest of the opinion the court refers only to the specific intent to do the evil prohibited by the statute, i.e., causing or attempting to cause insubordination, disloyalty, or mutiny. That case did not require "evil purpose" as the defendant reads it, but only required that the prohibited acts be done deliberately and with a specific purpose to do that which was prohibited. In *Truong Dinh Hung*, 629 F.2d at 919, the court discussed the trial court's instruction that "wilfully" meant "not

prompted by an honest mistake as to one's duties, but prompted by some personal or underhanded motive" and apparently approved such an instruction. It seems clear that the defendant here will not find much comfort in his defense that he did what he did with good intentions, unless he can also assert a defense that he did not do so "wilfully."

APPLICATION OF SECTION 641 TO THEFT OF CLASSIFIED INFORMATION

As the defendant properly notes, there has been no definitive court test of the applicability of 18 U.S.C. § 641 to unauthorized disclosures of classified information. Section 641 is a general statute prohibiting the theft or embezzlement of "things of value" belonging to the government. The first application of § 641 to the theft of government information came in *United States v. Ellsberg*, 687 F.2d 1316 (10th Cir. 1982), but that case was aborted because of prosecutorial misconduct. Since then, the government has attempted to apply that section in two other cases involving the disclosure of classified information, see *Truong*, 629 F.2d at 919, *United States v. Boyce*, 594 F.2d 1246, 1252 (9th Cir. 1979). In both those cases, the district court allowed the case to proceed under § 641 despite objections that § 641 was unconstitutional as applied to the theft of government information, but in both cases the Court of Appeals declined to reach the issue on appeal because of the concurrent sentence doctrine.

However, in *Truong*, Judge Winter wrote a separate opinion indicating that he would have reached the § 641 issue and would have found that § 641 could not be applied to the theft of government classified information. The defendant in this case has basically adopted the reasoning of Judge Winter, arguing that § 641 is unconstitutionally vague, and that that section makes it a crime for one "without authority" to sell or otherwise dispose

of government property. Judge Winter's theory and defendant's argument is that the phrase "without authority" is unconstitutionally vague.

Section 641 has been applied to other cases involving thefts of government information, *see United States v. Girard*, 601 F.2d 69 (2d Cir. 1979) (theft of DEA information); *United States v. Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971). However, its application in cases involving the theft of classified information, where the "authority" or lack thereof must come from reference to the classification system, has not been approved in any case which has reached the issue at the circuit level. In *Boyce*, and *Truong*, the defendants were convicted under § 641 for thefts of government classified documents, but as noted, the Court of Appeals did not reach the issue on appeal because of the concurrent sentence rule.

The government has argued that Judge Winter's conclusion is wrong, that it disregards the fact that Congress at different times may, in different ways, reach the same conduct with different criminal statutes. The language of the statute reaches "intangibles" such as information, and the government argues, thus the theft of classified documents would be covered by such a statute.

However, the Court does not have to grapple with the separate opinion in *Truong*. That portion of the opinion was stated in a case where the majority did not reach the issue and it is not controlling. The Court also notes other district courts have allowed prosecution under § 641 for similar conduct.

Defendant has also argued that even if § 641 can be applied to the unauthorized taking of government information in this case, it should not be applied where the taking involves public disclosure in circumstances which implicate First Amendment issues. Defendant argues

again that in all cases in which § 641 has been applied to the theft of information, the information was being acquired for private, covert use in illegal enterprises. *See Truong, Boyce, Girard*. He argues that there are separate issues when the Court must deal with the assertion of First Amendment rights and that because the danger of insensitivity to the First Amendment is great, the government may not use a general law not specifically aimed at expressive conduct to regulate such conduct. Defendant argues that using § 641 to regulate the disclosure of government information gives executive branch officials unbridled discretion to enforce the statute and thereby control the flow of government information to the public. Thus, government officials would be free to enforce the statute and thereby control the flow of government information to the public. Thus, government officials would be free to enforce their own information control policy, and liability may turn on nothing more than the fact that the disclosure embarrasses them or subjects them to public criticism.

These arguments have little to do with this case. It is most doubtful that Morison was asserting a First Amendment right in selling photographs and documents to *Jane's*. Where the phrase "without authority" is given content by reference to the classification system, then the disclosures that could be punished under § 641 would be those where the government has asserted an interest in secrecy by classifying a document or information "secret." It is clear that having decided that disclosures of classified information may be prosecuted under § 641, the defendant's motive in disclosing classified information is irrelevant.

Finally, the defendant has argued that the government cannot establish the theft of a thing of value worth more than \$100 and the Indictment should be dismissed. Morison argues that the statute applies only to things, not to intangibles, but that argument has been rejected

by many courts. See, e.g., *Girard*, 601 F.2d at 69 (theft of DEA information); *Friedman*, 455 F.2d at 1076 (theft of grand jury information). Morison also argues that the government must establish that it was permanently deprived of the objects, but that claim too has been rejected. *United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1976), cert. denied, sub. nom., *Lupo v. United States*, 429 U.S. 1038 (1977). Finally, Morison says that since the materials he used to copy these things are not worth \$100, there is no violation of the statute.

The government has asserted that it will prove that the things were worth more than \$100, and they must be given an opportunity to do so. A reading of the statute would indicate that the value of the "thing" is determinative only of the appropriate penalty. Finally, the statute itself defines one measure of "value" as "market value" and the government has alleged that the market value of these documents is greater than \$100, as evidenced by the fact that *Jane's* paid more than \$100. The Indictment will not be dismissed because of this claim.

78a

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 1, 1988

* * * *

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s) :
86-5008

The Court's opinion is enclosed.

* * * *

JOHN M. GREACEN
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5008

UNITED STATES OF AMERICA,
Plaintiff-Appellee
versus

SAMUEL LORING MORISON,
Defendant-Appellant
THE WASHINGTON POST, *et al.*,
Amici Curiae

On Petition for Rehearing with Suggestion
for Rehearing In Banc

[Filed Apr. 29, 1988]

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

80a

Entered at the direction of Judge Russell, with the concurrence of Judge Phillips and Judge Wilkinson.

For the Court

JOHN M. GREACEN
Clerk



SEP 28 1988

JOSEPH F. SPANIO, JR.
CLERK

No. 88-169

In the Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL LORING MORISON, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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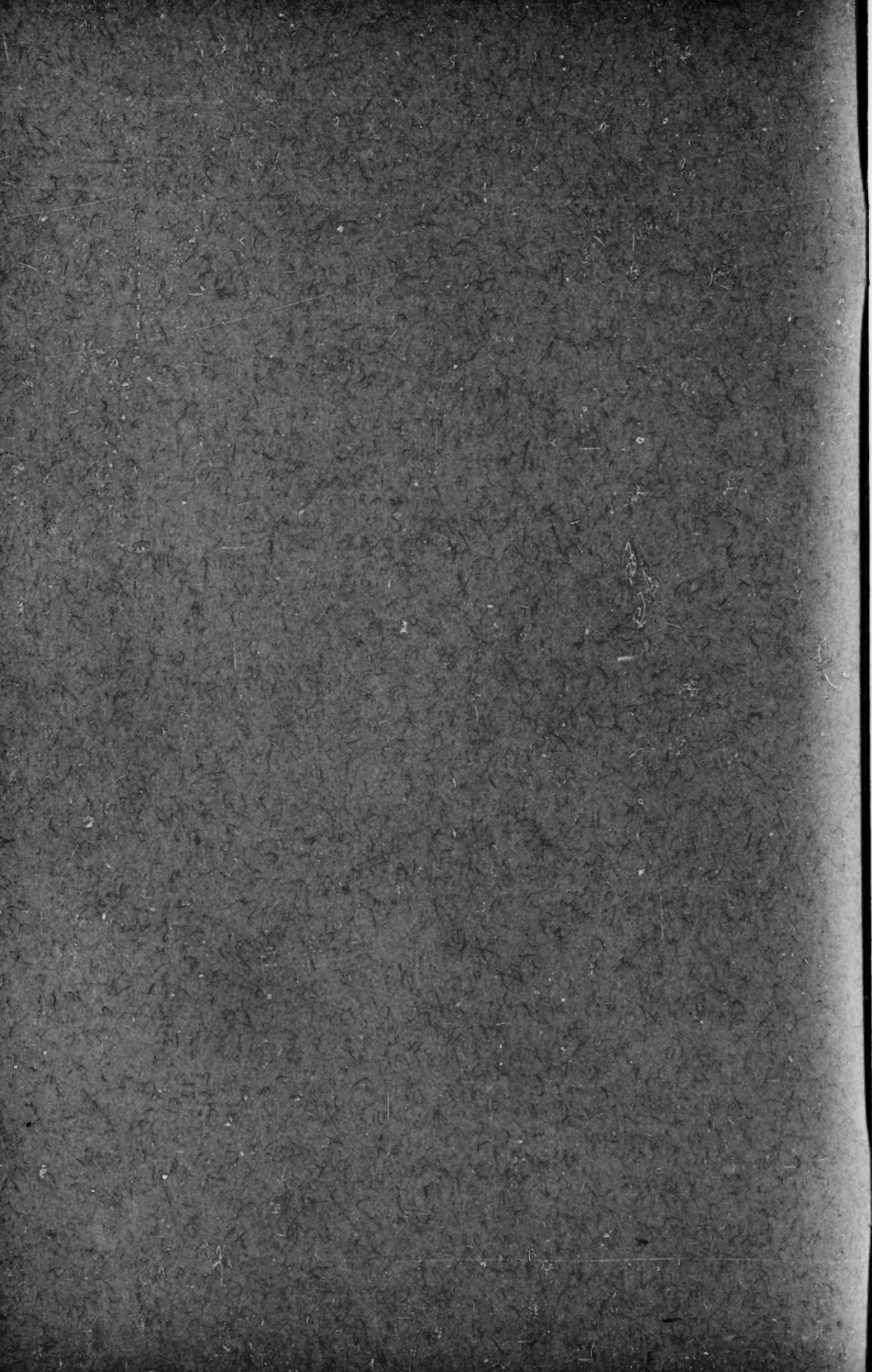
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23/24



QUESTIONS PRESENTED

1. Whether 18 U.S.C. 793(d), which proscribes the delivery of material or information relating to the national defense to "any person not entitled to receive it," and 18 U.S.C. 793(e), which proscribes the unauthorized retention of material or information relating to the national defense, apply to a federal employee who steals classified intelligence materials for the purpose of leaking them to representatives of the press.

2. Whether petitioner, who stole classified photographs and internal reports from the Naval Intelligence Support Center, was properly convicted under the theft-of-government-property statute, 18 U.S.C. 641.

3. Whether 18 U.S.C. 641 and 793(d) and (e) are unconstitutionally vague or overbroad.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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SAMUEL LORING MORISON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 844 F.2d 1057. The memorandum and order of the district court (Pet. App. 61a-77a) is reported at 604 F. Supp. 655.

JURISDICTION

The judgment of the court of appeals (Pet. App. 78a) was issued on April 1, 1988, and a petition for rehearing was denied on April 29, 1988 (Pet. App. 79a-80a). On June 16, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 28, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 641 (18 U.S.C.) provides:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Section 793 (18 U.S.C.) provides in pertinent part:

* * * * *

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any * * * photograph * * * relating to the national defense * * *, willfully communicates, delivers, transmits or causes to be communicated, delivered or transmitted * * * the same to any person not entitled to receive it * * *; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, * * * or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could

be used to the injury of the United States or to the advantage of any foreign nation, * * * willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

* * * * *

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

* * * * *

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of delivering classified photographs relating to the national defense to a person not authorized to receive them (Count 1), in violation of 18 U.S.C. 793(d); willfully retaining classified information relating to the national defense and failing to deliver it to the person entitled to receive it (Count 3), in violation of 18 U.S.C. 793(e); and theft of government property (Counts 2 and 4), in violation of 18 U.S.C. 641. He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-60a).

1. The evidence at trial, which is not in dispute, is summarized in the court of appeals' opinion (Pet. App. 3a-9a) and in the government's brief in the court of appeals (at 3-16). It showed that from 1974 until October 1984 petitioner was employed at the Naval Intelligence Support Center (NISC) in Suitland, Maryland. During 1984, petitioner was the analyst for Soviet amphibious and hospital ships and mine warfare at NISC, and he had a security clearance of Top Secret-Sensitive Compartmented Information. To obtain that clearance, petitioner signed a Non-Disclosure Agreement, in which he acknowledged,

among other things, that he was " 'obligated by law and regulation not to disclose any classified information in an unauthorized fashion' " (Pet. App. 3a, quoting the Non-Disclosure Agreement) and that such disclosure may violate, inter alia, 18 U.S.C. 793. Petitioner worked in a "vaulted" area to which only persons with Top Secret clearances were admitted. Because access to the area was restricted, employees within the vaulted area were permitted to leave classified documents uncovered on their desks. Pet. App. 3a-4a; Gov't C.A. Br. 3-4.

Also during 1984, petitioner was employed as editor of the American section of *Jane's Fighting Ships* (JFS), a British magazine, published annually, that provided current information on international naval operations. Petitioner signed a memorandum prepared by his superiors in which he agreed not to use government materials or equipment in connection with his work for JFS and acknowledged that he would not obtain classified information on the U.S. Navy or extract unclassified data on any subject and forward it to the magazine. In 1984, petitioner also began working for a second British publication, *Jane's Defence Weekly*, but he did so without seeking or receiving permission from his superiors. Unhappy with his employment at NISC, petitioner wrote a series of letters during the summer of 1984 to JFS representatives seeking full-time employment with *Jane's Defence Weekly*. He also interviewed for a job with Derek Wood, the editor-in-chief of the weekly magazine. Pet. App. 4a; Gov't C.A. Br. 4-5.

On July 24, 1984, a naval architect at NISC placed four glossy photographs on a desk approximately ten feet from petitioner's desk. The photographs, taken by a KH-11 photo-reconnaissance satellite, depicted a Soviet aircraft carrier under construction in a Black Sea naval shipyard. The photographs were dated July 14, 15, 19, and 20, and on their borders were stamped the words "Secret" and

"Warning Notice: Intelligence Sources or Methods Involved." The naval architect had been given the photographs so that he could analyze the capabilities of the carrier under construction. Pet. App. 5a-6a; Gov't C.A. Br. 5-6.

The architect retrieved one of the four photographs from the desk on July 25, 1984. On July 30, however, he discovered that the remaining three photographs were missing.¹ One of the three photographs thereafter appeared on the cover of the August 11 issue of *Jane's Defence Weekly*, and the other two photographs appeared in the lead article. Petitioner showed an advance copy of the issue to his supervisor on August 9, and acknowledged that the photographs could give away the nation's intelligence capabilities. Petitioner denied, however, that he had stolen the photographs. Nevertheless, on that same day, petitioner placed a telephone call to Derek Wood, the *Jane's Defence Weekly* editor-in-chief, and assured him that the photographs could not be traced to him. In early August, *Jane's Defence Weekly* paid petitioner \$300 for "editorial contributions" in July 1984. And when JFS later returned the three photographs to United States authorities, petitioner's fingerprint was on one of them. Pet. App. 6a-7a; Gov't C.A. Br. 6-9.

On August 22, 1984, investigators seized petitioner's office typewriter ribbon. A subsequent analysis of the ribbon revealed that petitioner had composed numerous letters to *Jane's Defence Weekly*, including one, addressed to Derek Wood, that summarized a secret intelligence report concerning an explosion at the Soviet naval facility at Severomorsk. On October 1, 1984, at Dulles International

¹ A two-day search was conducted to find the missing photographs. Petitioner participated in the search and, when asked, reported that he had not seen any of the photographs. Pet. App. 6a; Gov't C.A. Br. 6.

Airport, petitioner was arrested as he was about to board a plane for London. In a post-arrest statement, petitioner at first denied knowledge of the three photographs and insisted on his innocence. After additional questioning, however, he admitted that he had stolen the photographs from his co-worker's desk on July 30. He explained that he had removed the borders containing the "Secret" classification and the "Warning Notice," and had then forwarded the photographs to *Jane's Defence Weekly*. Pet. App. 6a-7a; Gov't C.A. Br. 8-10.²

That night, law enforcement officers searched petitioner's home and found an envelope marked "For Derek Wood only." Inside the envelope were excerpts from two NISC intelligence reports known as "Weekly Wires." The "Weekly Wires" were marked "Secret" at the bottom of every page. Both excerpts pertained to the explosion at the Severomorsk Naval base. Pet. App. 7a-8a; Gov't C.A. Br. 10-11.

The evidence at trial established that KH-11 photographic imagery is used by the intelligence community to understand external threats and to provide policy makers with intelligence information. Government experts explained that there has never been an authorized disclosure of KH-11 photographic images, and, despite three unauthorized disclosures in 1976, 1980, and 1981, foreign agents could learn additional information regarding our

² The evidence at trial showed that the day after petitioner mailed the photographs to *Jane's Defence Weekly*, petitioner wrote to Derek Wood: "I hope you will remember me when next year's budget is put together or when there is a vacancy. Without hesitation, you can have me at the drop of a hat * * *." Two weeks later, in a letter to a JFS editor, petitioner wrote: "At any rate I intend to get out of this pit as soon as I can. Hopefully, to JDW in January if Derek Wood has a position. You cannot believe how tired I am of all this idiocy." Gov't C.A. Br. 5 n.5.

intelligence capabilities from analyzing the photographs that petitioner sent to *Jane's Defense Weekly*.³ The evidence further showed that the "Weekly Wire" excerpts found in petitioner's residence would enable a Soviet intelligence officer to understand and evaluate our capacity to gather intelligence; to discover what we know about Soviet storage of biological and radiological weapons; and to learn that we are able to identify the "signatures" on Soviet vessels.⁴ Gov't C.A. Br. 11-13.

2. The court of appeals affirmed (Pet. App. 1a-60a). The court first rejected petitioner's contention that Sections 793(d) and (e) apply only to those persons who engage in "classic spying and espionage activity" by transmitting "national security secrets to agents of foreign governments with intent to injure the United States" (Pet. App. 9a (quotation and footnote omitted)). The court noted that, as petitioner had conceded, "the statutes themselves, in their literal phrasing, are not ambiguous on their face and provide no warrant for his contention" (*id.* at 10a (footnote omitted)). In particular, the court explained (*ibid.*), Section 793(d) applies to "whoever" transmits national defense information to "a person not entitled to receive it," and Section 793(e) applies to "whoever" retains such information without delivering it to an authorized

³ For example, the photographs revealed that the KH-11 was still operational, allowing a comparison of current capabilities with previous estimates and thus permitting other countries to take informed counter-measures. As proof of the value of the photographs, a CIA official testified that the government would have paid more than \$100 to retrieve the photographs prior to publication. Gov't C.A. Br. 12.

⁴ In order to establish the value of the "Weekly Wire" excerpts, the government introduced evidence that the United States would have paid more than \$100 to prevent the disclosure of the "Weekly Wires." Gov't C.A. Br. 13.

person. Neither statute, the court stated, is limited by its terms to spies or to "agent[s] of a foreign government," and neither contains an "exemption in favor of one who leaks to the press" (Pet. App. 10a-11a). The court of appeals also found nothing in the legislative history of the statute to support petitioner's limiting construction. The court noted (Pet. App. 14a) that a companion provision, Section 794, "prohibits disclosure to an 'agent * * * [of a] foreign government' " and thereby "covers the act of 'classic spying.' " By contrast, the court observed, Sections 793(d) and (e) "cover a much lesser offense than that of 'spying' and extend[] to disclosure to *any* person 'not entitled to receive' the information" (Pet. App. 14a (emphasis in original)). The court explained that the difference in the scope of the statutes accounts for the difference in penalties attached to the two provisions: Section 794 carries a maximum penalty of death or life imprisonment, while Sections 793(d) and (e) fix the maximum penalty at ten years' imprisonment. The court also pointed out that the sponsors of Section 793(d) understood the phrase "one not entitled to receive it" to include not merely agents of a foreign power, but *any* person whose receipt of covered information would be " 'against any statute of the United States or against any rule or regulation prescribed' " (Pet. App. 15a n.12, quoting 54 Cong. Rec. 3586 (1917) (Sen. Overman)). Finally, the court found no support in the legislative history for petitioner's assertion that Section 793 should be construed to exempt transmissions of information to the press (Pet. App. 19a-20a).⁵

⁵ Relying on this Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the court of appeals also rejected the claim that unless an exemption for disclosures to the press is "read into" Sections 793(d) and (e), those provisions would violate the First Amendment (Pet. App. 20a-22a). The court explained that "it seems beyond controversy that a recreant intelligence department employee who had abstracted

The court of appeals next held that Section 793 is not unconstitutionally vague. The court found that the phrase "relating to the national defense" was sufficiently clear and that the district court had adequately explained that phrase to the jury (Pet. App. 26a-28a). The court observed that "[w]ith the scienter requirement of Sections 793(d) and (e), bulwarked with the defendant's own expertise in the field of governmental secrecy and intelligence operations, the language of the statutes, 'relating to the national security,' was not unconstitutionally vague as applied to this defendant" (*id.* at 32a). The court further held that the phrase "entitled to receive" is sufficiently clear, particularly in light of the classification system set out under 18 U.S.C. App. 1 for the protection of national security information (Pet. App. 33a). The court of appeals also discerned no fatal overbreadth in the language of Sections 793(d) and (e) (Pet. App. 35a-37a).

Finally, the court of appeals rejected petitioner's challenge to his conviction on the two counts charging theft of government property, in violation of 18 U.S.C. 641 (Pet. App. 37a-40a). The court found no need to decide whether "information" constitutes "property" for purposes of Section 641, because petitioner had been charged with stealing "specific, identifiable tangible property, which will qualify as such for larceny or embezzlement under any possible definition of the crime of theft" (Pet. App. 39a). The court also rejected the contention that Section 641 is inapplicable because petitioner transmitted the stolen property to the press. The court explained (Pet. App. 39a-40a) that "[t]he mere fact that one has stolen a

from the government files secret intelligence information and had willfully transmitted or given it to one 'not entitled to receive it' as did [petitioner] * * *, is not entitled to invoke the First Amendment as a shield to immunize his act of thievery" (*id.* at 23a).

document in order that he may deliver it to the press, whether for money or for other personal gain, will not immunize him from responsibility for his criminal act. To use the first amendment for such a purpose would be to convert the first amendment into a warrant for thievery."

Judge Wilkinson wrote a concurring opinion (Pet. App. 47a-57a). In his view, the First Amendment interests at stake were not "insignificant" (*id.* at 47a), but he also explained that "[t]he way in which th[e] photographs were released * * * threaten[ed] a public interest that is no less important—the security of sensitive government operations" (*id.* at 48a-49a). In weighing those claims "[i]n the national security field," Judge Wilkinson stated, the courts must "perform [their] traditional balancing roles with deference to the decisions of the political branches of government" (*id.* at 50a). Under that principle, Judge Wilkinson concluded that "the application of this particular law to this particular defendant took place in accordance with constitutional requirements" (*id.* at 52a).

Judge Phillips concurred in the judgment and in Judge Wilkinson's opinion (Pet. App. 58a-60a). In his separate opinion Judge Phillips agreed with Judge Wilkinson that the case presented "real and substantial" issues under the First Amendment (*id.* at 58a). He concluded, however, that the trial court's instructions to the jury resolved any vagueness in the statutes at issue (*id.* at 59a).

ARGUMENT

1. Petitioner first contends (Pet. 17-21) that Sections 793(d) and (e) do not reach "[t]he source who leaks defense information to the press" (Pet. 17 (citation omitted)). The plain language of the statute, as petitioner implicitly concedes (see Pet. 17-18 n.7), flatly contradicts that claim. By its terms, Section 793(d) reaches "[w]ho-

ever," lawfully having access to any photograph "relating to the national defense," delivers or transmits that photograph "to any person not entitled to receive it." Petitioner does not assert, nor can he, that the editors of *Jane's Defence Weekly* were "entitled to receive" the photographs of the Soviet aircraft carrier — photographs that had been expressly marked "Secret" and that bore a "Warning Notice" that "[i]ntelligence [s]ources" were implicated (Pet. App. 5a-6a). Similarly, Section 793(e) applies without qualification to "[w]hoever having unauthorized possession of * * * any document * * * relating to the national defense * * * willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it." It does not exempt persons, like petitioner, who retain unauthorized material for the purpose of leaking it to the press.⁶

Petitioner's repeated suggestions that Section 793 applies only to "spies" (Pet. 18) and "those engaged in espionage" (Pet. 19) are also belied by the revealing differences between Section 793 and Section 794. As the court of appeals noted (Pet. App. 12a-14a), Section 794, unlike Section 793, proscribes the transfer of information relating to the national defense "to any foreign government" or to "any representative, officer, agent, employee, subject, or citizen thereof" (18 U.S.C. 794(a)). Section 794 thus expressly prohibits what petitioner has termed "classic spying" (see Pet. App. 9a), and for that reason it carries

⁶ Professors Edgar and Schmidt, on whose study of Section 793 petitioner extensively relies (see Pet. 17-18, 21, 25-26), have explained that "the language of the statute[] has to be bent somewhat to exclude publishing national defense material from its reach, and tortured to exclude from criminal sanction preparatory conduct necessarily involved in almost every conceivable publication of defense matters." Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 937 (1973).

a maximum penalty of death or life imprisonment. Section 793, by contrast, is not limited to disclosures to representatives of foreign governments, but prohibits delivering national defense information to "any person not entitled to receive it" (Section 793(d)) and retaining unauthorized possession of national defense information and failing to deliver it to an authorized person (Section 793(e)). In accordance with its broader scope, Section 793 carries the less severe maximum penalty of ten years' imprisonment, a \$10,000 fine, or both. That statutory structure demonstrates that Congress knew how to proscribe the act of "classic spying" when it wished to do so. See *Lehman v. Nakshian*, 453 U.S. 156, 162 (1981); *Galloway v. United States*, 319 U.S. 372, 389 (1943). Under traditional principles of statutory construction, the difference between the sections must therefore be seen as intentional. See *Fedorenko v. United States*, 449 U.S. 490, 512 (1981); *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256, 267 (1985); *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982).⁷

Petitioner does not deny that his conduct is proscribed by the plain language of Section 793. Relying on snippets of legislative history, however, he contends (Pet. 17-21) that Congress did not intend Section 793 to apply as broadly as its language suggests. As a preliminary matter,

⁷ Congress enacted Sections 793(d) and 794 at the same time (see Pet. App. 12a-13a), and "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). Accord *INS v. Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 10. See also *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148-149 (1980); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979).

we note that where, as here, the plain language is unambiguous, there is no need to resort to the legislative history. *Rubin v. United States*, 449 U.S. 424, 430 (1981). See also *United States v. Taylor*, No. 87-573 (June 24, 1988), slip op. 2 (Scalia, J., concurring) (“[t]he text is eminently clear, and we should leave it at that”). In any event, petitioner points to nothing in the legislative history that “would require [the Court] to question the strong presumption that Congress expresse[d] its intent through the language it cho[se].” *INS v. Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 10 n.12.

Petitioner first isolates brief excerpts from the legislative debates in which “supporters repeatedly stated that [Section 793] was designed to stop spies and that other Americans had nothing to fear” (Pet. 18). But petitioner overstates the evidence on that point. For example, although Senator Pittman declared that “[t]he object of this act is to punish spies” (*ibid.* (citing 54 Cong. Rec. 3599 (1917))), it is clear from the context of his remarks that the Senator sought merely to allay an opponent’s concern that, under what is now Section 793(a), a citizen could be punished for entering a navy yard to inquire what, if any, information he was entitled to have by law. See 54 Cong. Rec. 3596-3599 (1917). Similarly, although Senator Lee referred to “the ordinary methods of spies” (*id.* at 3592 (cited in Pet. 18 n.8)), he invoked that phrase to criticize the legislation because, in his view, the law “embraces a lot of innocent things that the American has been in the habit of doing” and because the law was *not* confined, as Senator Lee thought it should be, “to the spy that st[eals] the signal book off th[e] ship” (54 Cong. Rec. 3592-3593 (1917)).⁸ And while Senator Overman used the words

⁸ Indeed, Senator Lee complained that the statute would forbid the very activity that petitioner now claims he was involved in (see Pet. 6):

"spies and traitors" in explaining why the statute included "buildings" and "offices" among the places to which access might be restricted (*id.* at 3600 (cited in Pet. 18 n.8)), Senator Cummins, an opponent of the legislation, objected precisely because the statute was not expressly limited to the acts of spies and traitors. See 54 Cong. Rec. 3600 (Sen. Cummins) ("I wish the Senator * * * would use the word 'spy' in the act and the word 'traitor' in the act instead of in his speeches"). Finally, and in any event, petitioner points to no evidence that those legislators who referred to "spies" and "traitors" believed that the statute could be used *only* to prohibit what he terms "classic spying."

Petitioner also notes (Pet. 18-19) that in enacting the Espionage Act of 1917, and in amending the statute in 1950, Congress chose not to include a provision that would have imposed criminal sanctions on the press for publishing information relating to the national defense. See generally Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 946-965, 1013-1014 (1973). Petitioner infers that "[s]ince the legislators realized that [press] stories were based on information from government officials, * * * it is apparent that Congress also refused to criminalize disclosures by officials who leak to the press" (Pet. 18-19). That contention is meritless. Indeed, as Professors Edgar and Schmidt acknowledge, the fact that Congress enacted the predecessor to Section 793 at the same time that it rejected the press censorship provision demonstrates that the "rejection of [the latter] does not logically mandate impu-

"It is a very reprehensible thing to draw a statute * * * that it can be used in such ways as to punish a citizen who is doing a patriotic thing in proclaiming that his country is undefended, and pointing out where her defenses should be strengthened" (54 Cong. Rec. 3593 (1917)).

tation of altered understanding about the scope of [the former]." Edgar and Schmidt, *supra*, 73 Colum. L. Rev. at 1014. Petitioner does not identify any legislative history suggesting that Congress intended to extend the immunities of the press to government employees, like petitioner, who pilfer classified information and deliver it to persons, including the press, who are not entitled to possess it.⁹ As this Court has explained in an analogous context, "[i]t would be frivolous to assert * * * that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972).¹⁰

Petitioner also asserts (Pet. 19-20) that because Congress has enacted several other specific non-disclosure statutes, Sections 793(d) and (e) must not reach "the general practice of leaking." Neither Section 793(d) nor Section 793(e), however, is addressed to "the general prac-

⁹ The congressional debates suggest, if anything, exactly the opposite. One of the proponents of the 1917 legislation, Senator Overman, explained that "[a] man ought to be punished if he has [documents relating to the national defense] in his possession and he communicates them to the enemy *or anybody else*." 54 Cong. Rec. 3586 (1917) (emphasis added).

¹⁰ Petitioner's reliance (Pet. 19) on the remarks in 1949 of Attorney General Tom Clark is particularly misplaced since, in explaining why the statute would not stifle press reporting, he stated that "nobody other than a spy, saboteur, *or other person who would weaken the internal security of the Nation* need have any fear of prosecution under either existing law or the provisions of this bill." 95 Cong. Rec. 9749 (1949).

tice of leaking." To the contrary, Section 793(d) is narrowly confined to those persons who have lawful access to materials relating to the national defense and who deliver those materials to persons who are "not entitled to receive" them. Likewise, Section 793(e) is confined to those persons who retain unauthorized materials relating to the national defense. That subsection therefore has nothing to do with leaking at all. In any event, the fact that there may be some overlap among the cited statutes "is neither unusual nor unfortunate." *SEC v. National Securities, Inc.*, 393 U.S. 453, 468 (1969). Overlap among statutes is not a basis on which to relieve petitioner of his liability under the plain terms of Section 793. See *United States v. Naftalin*, 441 U.S. 768, 778 (1979) (the fact that two acts prohibit the same conduct "does not absolve [the defendant] of guilt for the transactions which violated the statute under which he was convicted"); *Edwards v. United States*, 312 U.S. 473, 484 (1941) (footnote omitted) (overlapping statutes "can exist and be useful, side by side"). See generally *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979).¹¹

2. Petitioner next contends (Pet. 21-25) that the theft-of-government-property statute, 18 U.S.C. 641, does not cover his conduct, because there is no basis for believing that "Congress intended that the * * * statute * * * be used to punish those who leak government documents" (Pet. 23). That claim, like petitioner's similar assertion about Section 793, founders on the plain language of the

¹¹ Petitioner cites (Pet. 20-21) several remarks by various government officials to show that, over the years, some members of the Executive Branch have questioned whether any criminal statute applies to leaks of classified information to the press. Whatever the accuracy of those isolated "generalizations," they are plainly "inadequate to overcome the plain textual indication" that Section 793 applies to petitioner's conduct. *United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, No. 86-1602 (Jan. 20, 1988), slip op. 13.

statute. Section 641 applies by its terms to "[w]hoever embezzles, steals, purloins, or knowingly converts to his own use or the use of another, or without authority, sells, conveys or disposes of any * * * thing of value of the United States or any department or agency thereof * * *." As the court of appeals observed, the statute "is written in broad terms with the clear intent to sweep broadly" (Pet. App. 38a). There is no exception for persons, like petitioner, who steal and thereafter market their wares to the press. Petitioner's suggestion (Pet. 22-23) that Section 641 should be read narrowly in light of other, specific anti-disclosure statutes once more overlooks the fact that statutory overlap is common and does not justify ignoring the plain language of a more general statute.

Petitioner also contends (Pet. 24-25) that this Court should resolve the question whether Section 641 applies to the theft of intangible property such as government information. That question, however, is not presented in this case. Petitioner stole three photographs and excerpts from the "Weekly Wire," an NISC intelligence report. Thus, as the court of appeals explained (Pet. App. 39a), here "[w]e are dealing with specific, identifiable tangible property, which will qualify as such for larceny or embezzlement under any possible definition of the crime or theft." Petitioner's claim that the photographs and reports were valued only because of the information they contained may well be true, but it does not diminish the fact that the materials themselves were tangible.¹²

¹² For that reason, petitioner's allegation (Pet. 24-25) of a conflict with two Ninth Circuit decisions is meritless. In *Chappell v. United States*, 270 F.2d 274, 276-278 (1959), the court of appeals held that labor—the services of a painter—is not a "thing of value" as that term is used in Section 641. The present case, by contrast, involves the theft of photographs and reports, which were tangible items, even though they derived much of their value from the classified information they

3. Finally, petitioner contends (Pet. 25-27) that Sections 641 and 793 are unconstitutionally vague and overbroad. That claim does not warrant further review. Because of "[t]he strong presumptive validity that attaches to an Act of Congress," this Court has held "many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). Moreover, the Court has emphasized, "[i]n determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged" (*id.* at 33). In the present case, as the court of appeals explained (Pet. App. 34a), petitioner knew perfectly well that he was stealing classified information, delivering it to persons not entitled to receive it, and retaining possession of it instead of returning it to its rightful owners. Indeed, petitioner went to extraordinary lengths to conceal both the theft as well as the classified nature of the purloined materials.

As for petitioner's claim (Pet. 26-27) that the phrase "relating to the national defense" in Section 793 is excessively vague, we note that this Court rejected that precise contention in *Gorin v. United States*, 312 U.S. 19 (1941). Like petitioner, Gorin was convicted under the Espionage Act of 1917 of delivering documents "connected with the

contained. The Ninth Circuit seems to have recognized that very point in the second case cited by petitioner, *United States v. Tobias*, 836 F.2d 449 (1988), cert. denied, No. 87-6545 (Apr. 4, 1988). There, the court distinguished *Chappell* and held that cryptographic cards, which are used to code and decode classified information, are tangible and may therefore give rise to a Section 641 prosecution. Cf. also *United States v. Friedman*, 445 F.2d 1076 (9th Cir.), cert. denied, 404 U.S. 958 (1971) (upholding Section 641 conviction for theft of grand jury transcripts).

national defense." The Court held that the phrase "national defense" has a "well understood connotation" that refers "to the military and naval establishments and the related activities of national preparedness" (*id.* at 28 (citation omitted)). The Court therefore concluded that the language in the Act is "sufficiently definite to apprise the public of prohibited activities and is consonant with due process" (*ibid.*).¹³

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Attorney

SEPTEMBER 1988

¹³ Petitioner's suggestion (Pet. 26) that Section 641 is overbroad if it covers "the unauthorized disclosure of any government document" mistakes the nature of the statute. Section 641 does not proscribe *disclosure* at all; it proscribes *theft* of government property.

4
No. 88-169

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL LORING MORISON,
v. *Petitioner,*

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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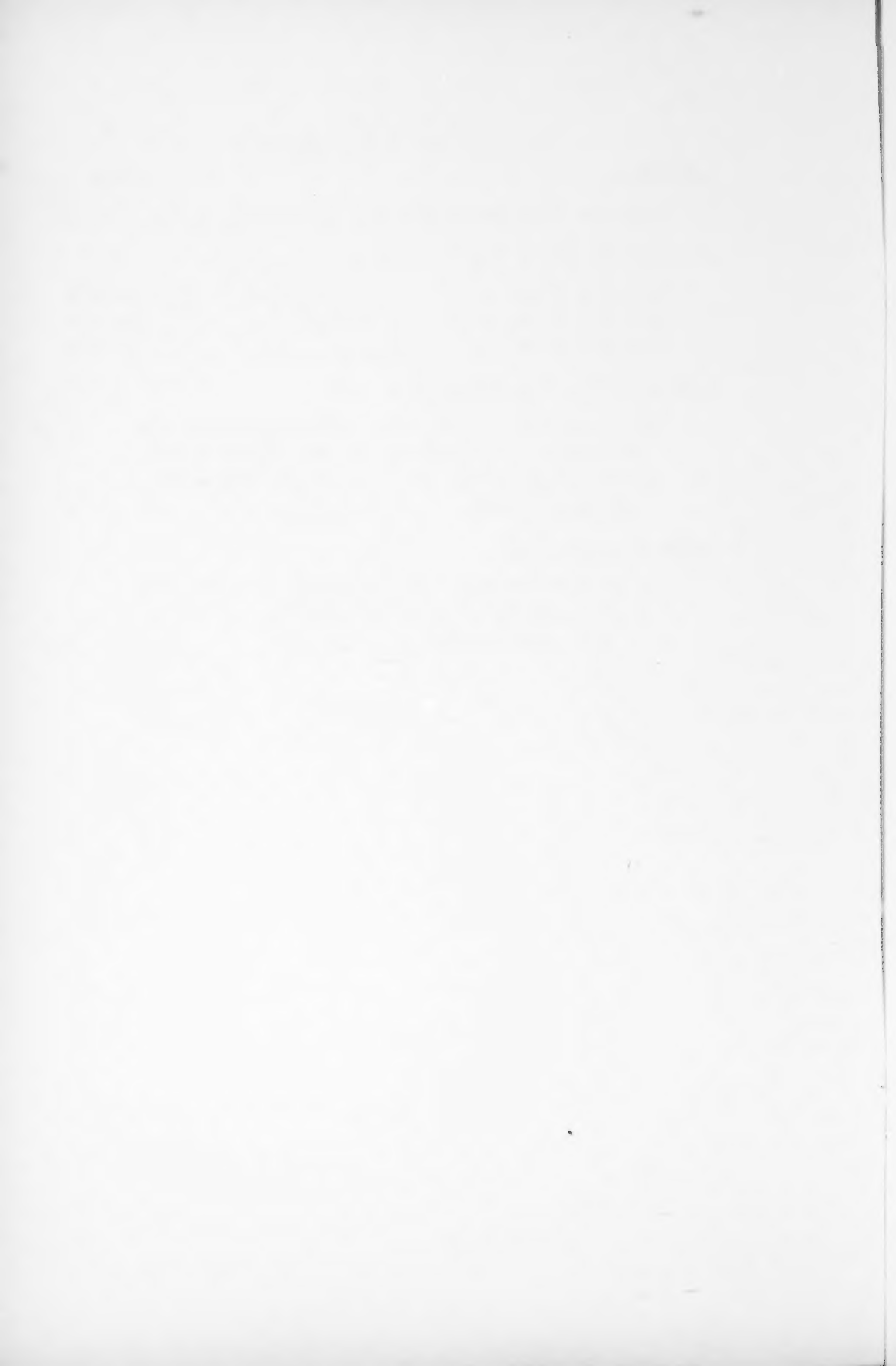
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for the Fourth Circuit**

REPLY BRIEF FOR PETITIONER

This case presents the questions of whether Congress intended the espionage statute, 18 U.S.C. § 793(d) and (e), and the theft of government property statute, 18 U.S.C. § 641, to apply to a government employee who discloses or retains documents relating to the national defense for the purpose of leaking them to the press; and, if so, whether these statutes, as construed by the courts below, are unconstitutionally vague or overbroad. The government does not deny that Morison is the first person to be convicted under these statutes for disclosing information to the press and that this case therefore presents questions of first impression. Nor does the government's brief in opposition say one word to dispute the

obvious importance for the press and the public of the questions raised by the government's test prosecution of Morison. This silence is a tacit admission that this case merits this Court's review.

The government's opposition is devoted entirely to an attempt to demonstrate that the plain language of the statutes applies to those who leak national defense information to the press. The government makes this argument as if the statutes involved here were regulatory legislation, for which the plain language rule has the greatest force. But this case involves criminal statutes that affect not only Morison's liberty, but also the press' ability to report to the public important information on the government's activities in the area of national defense. Under these circumstances, it is clearly appropriate for the Court to go beyond the plain language of the statutes and consider their legislative history, subsequent acts of Congress, the views of Executive Branch officials responsible for protecting the national security, and the government's failure for decades to use these statutes as it has used them against Morison. All these factors are relevant to the ultimate questions of whether Congress intended the statutes to apply to Morison's conduct and whether Morison had adequate notice that his conduct was criminally proscribed.

It is also disingenuous for the government to rely on the plain language of subsections 793(d) and (e) when the government urged the courts below to adopt a limiting construction of the term "relating to the national defense" in order to deflect Morison's constitutional attack on the statute. Furthermore, the plain language of section 641 does not resolve the issue of whether Congress intended juries to value government documents on the basis of the information they contain rather than, as

the statutory language suggests, on the basis of their worth as tangible property.¹

The government chastises petitioner for relying on "snippets of legislative history" (Br. in Opp. at 12) and asserts that the legislative history is in fact consistent with its view that subsections 793(d) and (e) apply to leaks. A petition for certiorari is not the place for a full exposition of the legislative history of the Espionage Act of 1917, and at this stage Morison relies heavily on an exhaustive study of the statute that concluded that "Congress undoubtedly did not understand 793(d) and (e)" to reach "[t]he source who leaks defense information to the press." Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 1000 (1973). This study amply demonstrates that the government's view of the legislative history is open to serious challenge.²

The government also seeks to avoid the significance of the fact that Congress has enacted other statutes to proscribe disclosure of specific types of national defense information by pointing out that there is nothing unusual about Congress enacting overlapping statutes. Morison's point, which the government has not met, is that Congress enacted these other statutes not to add new penalties to those provided by existing law, but because Congress understood the Espionage Act of 1917 to cover only disclosures to spies and the theft statute to have no application at all to leaks to the press. The enactment of these specific statutes demonstrates that Congress believed that sections 793(d) and (e) and 641 did not au-

¹ Significantly, the government concedes that Morison's felony convictions under section 641 were based on the value of the information in the photographs and Weekly Wires rather than their tangible value. (Br. in Opp. at 17.)

² Ironically, the government relies on "snippets" of the Edgar and Schmidt article to attempt to blur its central conclusion on subsections 793(d) and (e).

thorize prosecution of those who disclose to the press the highly sensitive material covered by the subsequent legislation.

The government also attempts to minimize the widely-held view of national security officials that current law does not criminalize leaks to the press by suggesting that only "some members of the Executive Branch have questioned whether any criminal statute applies to leaks of classified information to the press." (Br. in Opp. at 16 n.11.) This view is not, as the government suggests, the idiosyncratic opinion of a few dissenting officials. Instead it is the long-held institutional position of the CIA, which the Agency conveyed to the Office of Management and Budget even after Morison had been indicted and was awaiting trial. See Pet. at 21. Since the CIA and the Department of Justice cannot agree whether sections 793(d) and (e) and 641 apply to leaks, these statutes plainly fail to meet the fundamental constitutional requirement that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Finally, the government fails to account for the fact that prior to this case there had been only one indictment and no convictions under the espionage and theft statutes for disclosures to the press. In 1979 the General Counsel of the CIA told Congress that if subsections 793(d) and (e) apply to leaks, "we have had in this country for the last 60 years an absolutely unprecedented crime wave because surely there have been thousands upon thousands of unauthorized disclosures of classified information" *Espionage Laws and Leaks: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 22 (1979). In view of the length of time sections

793 and 641 have been on the books—over 70 and 100 years, respectively—and the frequency of leaks, the failure to use the statutes is persuasive evidence that they were not intended or understood to apply to leaks. It is simply not adequate to respond, as did the court of appeals (Pet. App. 18a), that leakers are difficult to catch and that prosecutions may lead to disclosure of more classified data. Those concerns are even more acute in cases of real espionage, and there has been no lack of prosecutions of spies during the many years when there were no prosecutions of leakers.

The government's opposition also contains a serious misstatement. The government asserts that the nondisclosure agreement Morison signed acknowledged that unauthorized disclosure of classified information "may violate, *inter alia*, 18 U.S.C. § 793." (Br. in Opp. at 4.) This is not correct. In paragraph 3 of the agreement Morison acknowledged that "I am obligated by law and regulation not to disclose any classified information in an unauthorized fashion." (Court of Appeals App. 1178). This paragraph does not specify what laws or regulations impose this obligation, and the paragraph makes no mention whatsoever of criminal penalties. However, in paragraph 6 of the agreement Morison acknowledged that "I have been advised that any disclosure of Sensitive Compartmented Information by me may constitute violations of United States criminal laws, including [*inter alia* 18 U.S.C. § 793]."

According to this agreement, criminal liability attaches only to the disclosure of Sensitive Compartmented Information (SCI), which is a special category of classified information. The photographs and Weekly Wires, although classified, were not designated as SCI. Morison's secrecy agreement therefore supports his position that he was not on adequate notice that disclosure of non-SCI classified information was a criminal offense. Furthermore, the distinction drawn in the agreement between non-SCI classified information and SCI information

for purposes of criminal liability further underscores the confusion within the government over the reach of subsections 793(d) and (e). Moreover, the omission from the secrecy agreement of any mention of section 641 shows that the government officials who drafted the agreement did not understand that statute to apply to disclosure of classified documents.

In summary, whether the espionage and theft statutes apply to leaks to the press is a complex question of undoubted importance that cannot be answered by wooden application of the plain language rule. Because this case involves harsh penal statutes whose interpretation will affect the amount of information about the operations of government that is available to the public, it is appropriate for the Court to consider all the factors outlined above to determine whether Congress intended these statutes to apply to disclosures to the press and whether Morison had adequate notice that his conduct was criminally proscribed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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